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A TREATISE ON THE LAW OF EVIDENCE

AS ADMINISTERED IN ENGLAND AND IRELAND;

WITH

*ILLUSTRATIONS FROM SCOTCH, INDIAN, AMERICAN,
AND OTHER LEGAL SYSTEMS.*

BY

HIS HONOUR THE LATE JUDGE PITT TAYLOR.

TENTH EDITION.

BY

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Longum iter est per praecepta,
Breve et efficax per exempla.—SENECA.

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IN TWO VOLUMES.

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CONTINUATION OF PART IV.

EVIDENCE SUBJECT TO SPECIAL RULES OF LAW.

CHAPTER III.

MATTERS REQUIRING TO BE EVIDENCED BY WRITINGS.

§ 972. In the present chapter will be considered briefly those matters which the law requires to be proved by the evidence afforded by a *written document* more or less formally executed. Writings are of two kinds, namely, (1) writings under seal, which are called "*deeds*," and (2) ordinary writings not under seal.

§§ 972,
973-4.

§§ 973-4. First, as to deeds. There are some transactions which are, by the Common Law, required to be evidenced by deed. The most important of such transactions are those which relate to *incorporeal rights*; all of which, whether they amount to an interest in land or not, lie in *grant*, and accordingly can be neither created, assigned, demised, nor surrendered, except by *deed*.¹ Such things as advowsons, ferries,² rents, profits à prendre, easements, and the like, are "*incorporeal rights*"; as, also, are interests in lands not in possession, like remainders, or reversions for life or years. The principle, which requires incorporeal rights to be evidenced by documents under seal, depends on the *nature* of the subject-matter, and not on the quality or amount of interest granted, transferred, or surrendered. Accordingly, a right of

¹ Wood v. Leadbitter, 1845, 14 L. J. Ex. 161; Hewlins v. Shippam, 1826, 5 B. & C. 229; Co. Litt. 337 b, 338 a; 2 Shep. Touch. 300; 1 Wms. Saund. 236 a; Lyon v. Reed, 1844, 13 L. J. Ex. 377; Bird v. Higginson, 1837, 2 A. & E. 696; Mayfield v. Robinson, 1845, 7 Q. B. 486; Roffey v. Henderson, 1851, 17 Q. B. 574.

The better opinion is that the cancellation or destruction of the deed will *not* draw after it the loss of the interest itself, even where it is one which is necessarily in writing. See Greenleaf on Ev. 15th edit. (1892), §§ 265 and 568.

² Mayfield v. Robinson, 1845, 7 Q. B. 486.

§§ 973-4. common (which is a profit à prendre), or a right of way (which is an easement or a right in nature of an easement), can no more be granted or conveyed for life, for years, or even for days, without a deed, than in fee-simple.¹ So strict is this rule that even a ticket of admission to a theatre during a season, or to a grand-stand during races, affords no irrevocable title to the party purchasing it, who, after notice of revocation, can be removed by the owner of the premises, without any reason assigned, and without so much as the price of the ticket being returned; and whose only remedy is to bring an action, founded on a breach of contract, against the person who sold the ticket, or against those who authorised its sale.² And *any* mere personal licence of pleasure, as the privilege of hunting, will be revocable, whether granted by parol, or under seal.³ Such privileges as those of hunting, fishing or shooting, *coupled with a right of taking away the game when killed*, are indeed profits à prendre, and as such can only be irrevocably granted by deed to a person and his assigns.⁴ But, although a parol demise of an incorporeal hereditament passes no estate, a grantor is entitled to recover from a grantee, who has actually occupied and enjoyed the thing so demised, such reasonable sum as the jury shall assess, for the latter's actual enjoyment.⁵ So, too, the grantee of a revocable licence is entitled to reasonable notice of revocation, and is entitled to damages for any loss he may have sustained by reason of such notice not having been given.⁶

¹ Wood v. Leadbitter, 1845, 14 L. J. Ex. 161. See Williams v. Morris, 1841, 11 L. J. Ex. 126; Perry v. Fitzhowe, 1846, 15 L. J. Q. B. 239.

² Wood v. Leadbitter, 1845, 14 L. J. Ex. 161; overruling Tayler v. Waters, 1817, 7 Taunt. 374; and explaining Webb v. Paternoster, 1620, Palm. 71; Kerrison v. Smith, 1897, 2 Q. B. 445; Wood v. Lake, 1751, Sayer, 3; and Wood v. Manley, 1839, 9 L. J. Q. B. 27. See, also, Taplin v. Florence, 1851, 20 L. J. C. P. 137.

³ Wood v. Leadbitter, 1845, 14 L. J. Ex. 161; Wickham v. Hawker, 1840, 10 L. J. Ex. 153; Thomas v. Sorrell, Vaugh. 351 (undated). And

see Guyot v. Thomson, [1894] 3 Ch. 388.

⁴ Doe v. Lock, 1835, 2 A. & E. 705; Wickham v. Hawker, 1840, 10 L. J. Ex. 153; recognised in Durham & Sunderl. Rail. Co. v. Walker, 1842, 2 Q. B. 940; Bird v. Higginson, 1837, 2 A. & E. 696; Barker v. Davis, 1864, 34 L. J. M. C. 140.

⁵ Bird v. Higginson, 1837, 2 A. & E. 696; Thomas v. Fredericks, 1847, 16 L. J. Q. B. 393. See post. §§ 981—984, 1036, 1043.

⁶ Mellor v. Watkins, 1874, L. R. 9 Q. B. 400; Aldin v. Latimer Clark, Muirhead & Co., [1894] 2 Ch. 427. See, also, Kerrison v. Smith, *supra*; Wilson v. Tavener, [1901] 1 Ch. 578.

§ 975.

§ 975. Deeds are also in certain cases required as evidence to prove a transfer of personal property, the law as to which is, in substance, as follows:—A gift which is clearly¹ proved to have been given in contemplation of death,² is called a *donatio mortis causâ*, and unless made *bonâ fide* twelve months before the donor died must be accounted for at the Inland Revenue Office, and will be liable to probate duty.³ A mere verbal gift of such a nature, without actual delivery, passes no property to the donee;⁴ and this whether the chattel was at the time of the gift in the actual possession of the donor or of the donee.⁵ Moreover, the gift of a chattel *inter vivos*, whether made verbally or in writing without deed, is not binding, unless there be either an actual delivery of possession of the property,⁶ or a declaration of trust respecting it.⁷ Neither will the courts substitute one of these modes of dealing for the other in order to effectuate the gift, when by so doing the real intentions of the donor would be defeated.⁸ No rule of equity, moreover, perfects an imperfect gift by such a contrivance, even in favour of a *bonâ fide* present by a husband to his wife. A gift such as that just referred to will, however, be deemed irrevocable, if effected by a declaration of trust, or if accompanied by delivery of possession,⁹ or possibly if followed by some statement or act on the part of the donee testifying his acquiescence in the gift.¹⁰ A gift, however, if made by deed, is complete without any delivery by the donor or acceptance by the donee, until disclaimer by the latter;¹¹ but such

¹ See *M'Gonnell v. Murphy*, 1869, Ir. R. 3 Eq. 460.

² *Соснакин v. Grice*, 1862, 15 Moo. P. C. C. 215 (P. C.).

³ 44 V. c. 12 ("The Customs and Inland Revenue Act, 1881"). §§ 38, 39, as amended by 52 & 53 V. c. 7, § 11.

⁴ *Smith v. Smith*, 1733-4, 2 Str. 955; *Bunn v. Markham*, 1814, 2 Marsh. 532; *Powell v. Hellicar*, 1858, 28 L. J. Ch. 255; *M'Gonnell v. Murphy*, 1869, Ir. R. 3 Eq. 460. See *Moore v. Moore*, 1874, L. R. 18 Eq. 474; *Rolls v. Pearce*, 1877, 5 Ch. D. 730; *Austin v. Mead*, 1880, 15 Ch. D. 631.

⁵ *Shower v. Pilck*, 1849, 19 L. J. Ex. 113.

⁶ See *Kilpin v. Ratley*, [1892] 1 Q. B. 582; *Cochrane v. Moore*, 1890, 25 Q. B. D. 57.

⁷ *Milroy v. Lord*, 1862, 31 L. J. Ch. 798.

⁸ *Breton's Estate*, In re, 1881, 17 Ch. D. 416.

⁹ See *Bourne v. Fosbrooke*, 1865, 34 L. J. C. P. 164.

¹⁰ Serjeant Manning's note, 1846, in 1 C. B. 381, n. (d), and note to same effect in 2 M. & Gr. 691, n. (a), 1842; cited by Parke, B., in *Flory v. Denny*, 1852, 21 L. J. Ex. 223; questioning *Irons v. Smallpiece*, 1819, 2 B. & Ald. 551.

¹¹ *Id.*; *Siggers v. Evans*, 1855, 24 L. J. Q. B. 705. See *Hobson v. Thellusson*, 1867, 36 L. J. Q. B. 302.

§§ 975--
977.

disclaimer may be by parol.¹ An assignment of chattels for a valuable consideration by way of mortgage will be binding upon the parties, though made by instrument not under seal, and though unaccompanied by any actual or symbolical delivery.²

§ 976. Contracts made and acts done by corporations form another class of transactions, in general required by the common law to be evidenced by deed.³ The general rule of law is, that a corporation aggregate cannot express its will or do any act except under seal, and this rule (which may be traced to a remote antiquity) is founded on the assumption, that the concurrence of the whole body corporate in any particular act, can best be authenticated by the affixing of the corporate seal to the document relating to such act.⁴ Its common seal has, in the quaint phraseology of olden times, been termed "the hand and mouth of the corporation."⁵ This rule has been discarded in the United States as highly impolitic, and is now almost entirely superseded in practice.⁶ In England, it has been described by one of our most accomplished judges as "a relic of barbarous antiquity,"⁷ but still partially holds its ground.

§ 977. The rule has, however, from the earliest traceable period, been subject to certain *exceptions*, which rest upon a principle of convenience, amounting almost to necessity,⁸ and which relate either to *trivial matters of frequent recurrence*, or to *such affairs* as from their nature *do not admit of delay*.⁹ As said

¹ Id.; Shep. Touch. 285.

² Flory v. Denny, 1852, 21 L. J. Ex. 223.

³ Arnold v. May. of Poole, 1842, 12 L. J. C. P. 97; May. of Ludlow v. Charlton, 1840, 9 C. & P. 242; Church v. Imp. Gas Light and Coke Co., 1838, 6 A. & E. 846; Paine v. Strand Union, 1846, 15 L. J. M. C. 89; Lamprell v. Billericay Union, 1849, 18 L. J. Ex. 282. As to contracts made by the London County Council, see 18 & 19 V. c. 120 ("The Metropolis Management Act, 1855"), § 149; and 51 & 52 V. c. 41 ("The Local Government Act, 1888"), § 40 (8).

⁴ May. of Ludlow v. Charlton, 1840, 9 C. & P. 242 (Rolfe, B.); Church v. Imp. Gas Light and Coke

Co., 1838, 6 A. & E. 846.

⁵ R. v. Bigg, 1717, 3 P. Wms. 423, cited by Tindal, C.J., in Gibson v. E. India Co., 1839, 5 Bing. N. C. 269. As to when a corporation may adopt a private seal, see ante, § 149.

⁶ See 2 Kent, Com. 289, citing Bk. of Columbia v. Patterson, 1813, 7 Cranch, 299 (Am.). See, also, Beverley v. Lincoln Gas Co., 1837, as reported 6 A. & E. 837, 838 (Patteson, J.).

⁷ South of Irel. Colliery Co. v. Waddle, 1869, L. R. 4 C. P. 618.

⁸ Church v. Imp. Gas Light and Coke Co., 1838, 6 A. & E. 846 (Id. Denman), cited by Rolfe, B., in May. of Ludlow v. Charlton, 1840, 9 C. & P. 242.

⁹ Arnold v. May. of Poole, 1842,

in a well-considered case,¹—"A corporation which has a head may give a personal command and do small acts; as it may retain a servant. It may authorise another to drive away cattle damage feasant, or to make a distress, or the like. These are all matters so constantly recurring, or of so small importance, or so little admitting of delay, that, to require in every such case the previous affixing of the seal, would be greatly to obstruct the every-day ordinary convenience of the body corporate, without any adequate object. In such matters the head of the corporation seems, from the earliest times, to have been considered as delegated by the rest of the members to act for them."

§§ 977—
979.

§ 978. With the advent of trading companies the exceptions mentioned in the preceding paragraph have been considerably extended. In the case² from which a quotation has just been taken, it is remarked, that, "in modern times, a new class of exceptions has arisen. Corporations have of late been established, sometimes by royal charter, more frequently by Act of Parliament, for the purpose of carrying on *trading speculations*; and where the nature of their constitution has been such as to render the *drawing of bills*, or the *constant making of any particular sort of contracts necessary for the purposes of the corporation*, there the courts have held that they would imply in those, who are, according to the provisions of the Charter or Act of Parliament, carrying on the corporation concerns, an authority to do those acts, without which the corporation could not subsist." The principle, however, remains the same, and the rule requiring contracts by corporations to be by deed is only relaxed where there is "convenience amounting almost to necessity. Wherever to hold the rule applicable would occasion very great inconvenience or tend to defeat the very object for which the corporation was created."³

§ 979. With regard to companies incorporated by Act of Parliament subsequent to 1845, and to companies registered under the Companies Acts, special powers of contracting, otherwise than

12 L. J. C. P. 97 (Tindal, C.J.);
De Grave v. May. of Monmouth,
1830, 4 C. & P. 111.

¹ May. of Ludlow v. Charlton,
1840, 9 C. & P. 242 (Rolfe, B.).

² Id.

³ Church v. Imp. Gas Light and
Coke Co., 1838, 6 A. & E. 846, per
Denman, C.J.

§ 979.

under seal, have now been given.¹ The principle stated in the preceding paragraph appears, however, to apply not only to trading companies but to all corporations aggregate, whenever the making of a certain description of contract is necessary and incidental to the purposes for which the corporation was created;² and modern decisions establish the following propositions, although some of the decisions were no doubt influenced by the question whether the contract was executed or executory, a subject which will be dealt with hereafter.³ An action *will* lie against a gas company for meters sold to them,⁴ and by them against the consumer, either for not accepting gas according to his agreement,⁵ or for the price of gas supplied to him,⁶ although the agreement be not under seal; a colliery company which had verbally contracted with an engineer for the erection of machinery to work their mine, and had paid him part of the price, was permitted to recover damages for breach of this agreement;⁷ actions also lie against the guardians of the poor of an union⁸ for iron gates,⁹ for water-closets,¹⁰ or for coals,¹¹ supplied for the union workhouse under parol contracts; an accountant, employed to audit the books of a poor-law union, can maintain an action for work done as against the guardians, although the contract was not under seal;¹² a surgeon retained by the general manager of a railway to attend a servant of the company injured by an accident on the line can recover his charges, though only verbally engaged;¹³ a parol contract by the directors of a

¹ See post, §§ 987-8, 989.

² *Clarke v. Cuckfield Union*, 1851-2, 21 L. J. Q. B. 349 (Wightman, J.; in an elaborate argument). See, also, *Nicholson v. Bradfield Union*, 1866, 35 L. J. Q. B. 176; *Wells v. Kingston-upon-Hull*, 1875, L. R. 10 C. P. 402.

³ Post, §§ 982-984A.

⁴ *Beverley v. Lincoln Gas Light and Coke Co.*, 1837, 6 A. & E. 829.

⁵ *Church v. Imp. Gas Light and Coke Co.*, 1838, *supra*.

⁶ *City of Lond. Gas Light and Coke Co. v. Nicholls*, 1826, 2 C. & P. 365.

⁷ *South of Irel. Colliery Co. v. Waddle*, 1869, L. R. 4 C. P. 618.

⁸ Who are constituted a corporation by "The Union and Parish

Property Act, 1835" (5 & 6 W. 4, c. 69, § 7).

⁹ *Saunders v. St. Neots' Union*, 1846, 15 L. J. M. C. 104. But see *Smart v. West Ham Union*, 1855, 24 L. J. Ex. 201.

¹⁰ *Clarke v. Cuckfield Union*, 1851-2, 21 L. J. Q. B. 349. See *Pauling v. Lond. & N. West. Rail. Co.*, 1853, 23 L. J. Ex. 105.

¹¹ *Nicholson v. Bradfield Union*, 1866, L. R. 1 Q. B. 620.

¹² *Haigh v. North Brierley Union*, 1858, 28 L. J. Q. B. 62.

¹³ *Walker v. Gt. West. Rail. Co.*, 1867, L. R. 2 Ex. 228; overruling *Cox v. Midl. Rail. Co.*, 1849, 18 L. J. Ex. 65, so far as relates to the necessity of a sealed contract.

§§ 979,
980.

chartered Navigation Company to pay a person a certain salary in consideration of his going to Sydney and bringing home one of their ships, has been enforced as against the company, the plaintiff having performed his part of the agreement;¹ and the same company has recovered damages for ale bought for the use of the passengers on board one of their steam vessels, being unfit for use, though the agreement for the purchase was not under seal.²

§ 980. On the other hand, some contracts are considered *not* to be of such frequent occurrence, or of such small importance, or so essentially necessary for the purposes for which the corporations were respectively instituted, as to be taken out of the general rule requiring the contracts of corporations to be under seal.³ Amongst these are a contract with a *copper* mining company for a supply by them of *iron* rails;⁴ a contract with a water company for the supply to them of iron pipes;⁵ a contract for erecting engines and machinery for a water company;⁶ a contract with a railway company to execute extensive repairs on their permanent line of rails;⁷ a contract with guardians of the poor to make a map of the rateable property of a parish in the union;⁸ a contract with guardians to do some extra work in building a poor-house;⁹ and a contract with guardians for the engagement of a clerk to the master of a workhouse.¹⁰ Moreover, even before the East India Company ceased to be merchants, an allowance by them of a retiring pension to a

¹ *Henderson v. Austral. Roy. Mail St. Nav. Co.*, 1855, 24 L. J. Q. B. 322. See, also, *Reuter v. Elect. Teleg. Co.*, 1856, 26 L. J. Q. B. 46.

² *Austral. Roy. Mail St. Nav. Co. v. Marzetti*, 1855, 24 L. J. Ex. 273.

³ *Church v. Imp. Gas Light & Coke Co.*, 1838, 6 A. & E. 846 (Ld. Denman, explaining *E. Lond. Waterw. Co. v. Bailey*, 1827, 4 Bing. 283. See, also, *Paine v. Strand Union*, 1846, 15 L. J. M. C. 89; *Ernest v. Nicholls*, 1857, 6 H. L. C. 401; *Lond. Dock Co. v. Sinnott*, 1857, 27 L. J. Q. B. 129; *Prince of Wales Life Ass. Co. v. Harding*, 1858, 27 L. J. Q. B. 297.

⁴ *Copper Miners' Co. v. Fox*, 1851,

20 L. J. Q. B. 174.

⁵ *E. Lond. Waterw. Co. v. Bailey*, 1827, 4 Bing. 283 (explained (Ld. Denman) in *Church v. Imp. Gas Light & Coke Co.*, 1838, 6 A. & E. 846), would seem now not to be law. See ante, § 979.

⁶ *Homersham v. Wolverh. Waterw. Co.*, 1851, 6 Ex. 137 (probably not law). See ante, § 979.

⁷ *Diggle v. Lond. & Blackwall Rail. Co.*, 1850, 19 L. J. Ex. 308.

⁸ *Paine v. Strand Union*, 1846, 15 L. J. M. C. 89.

⁹ *Lamprell v. Billericay Union*, 1849, 18 L. J. Ex. 282.

¹⁰ *Austin v. Guard. of Bethnal Green*, 1874, L. R. 9 C. P. 91.

§§ 980— military officer was held not to be recoverable in a court of law,
981a. unless granted by deed.¹

§ 981. Moreover, to render a corporation liable in tort for the acts of its servants it is not necessary that the authority of such servants should be conferred by an instrument under seal;² and the rule requiring them to act by deed will not protect them, either where goods have been wrongly taken by their agent,³ or from liability where they have wrongfully possessed themselves of money belonging to the plaintiff.⁴ This last exception rests on necessity; for a corporation would scarcely put its seal to a promise to return money wrongfully received, so that if a seal were necessary, the injured party would be without remedy. Conversely and consistently with this rule, it is held that a corporation may even be liable for a libel,⁵ or for a malicious prosecution,⁶ by its servants—although it can maintain an action for a libel affecting the corporate property, but cannot maintain one for a libel charging it with an offence—such as corruption—of which only the individuals constituting it can be guilty, and not the corporation itself in its corporate capacity.⁷

§ 981A. An action is clearly maintainable *by* a corporation,⁸ for

¹ *Gibson v. E. India Co.*, 1839, 5 Bing. N. C. 269. See *Cope v. Thames Haven Dock & Rail. Co.*, 1849, 18 L. J. Ex. 345.

² *East. Cos. Rail. Co. v. Broom*, 1851, 20 L. J. Ex. 196; *Whitfield v. S. East. Rail. Co.*, 1858, 27 L. J. Q. B. 229. This was an action for a libel transmitted by telegraph from one station to another on the defendants' line of rails. See, also, *Green v. Lond. Gen. Omnibus Co.*, 1859, 29 L. J. C. P. 13; *Roe v. Birkenhead, Lanc. & Chesh. Junc. Rail. Co.*, 1851, 21 L. J. Ex. 9; *Goff v. Gt. North. Rail. Co.*, 1869, 30 L. J. Q. B. 148; *Moore v. Metrop. Rail. Co.*, 1872, L. R. 8 Q. B. 36; *Poulton v. Lond. & S. West. Rail. Co.*, 1867, L. R. 2 Q. B. 534; *Stewart v. Anglo-Califor. Gold Mining Co.*, 1852, 21 L. J. Q. B. 393; *Stevens v. Midl. Rail. Co. and Lander*, 1854, 23 L. J. Ex. 328.

³ *Yarborough v. Bank of Engl.*, 1812, 16 East. 6.

⁴ *Hall v. May. of Swansea*, 1844,

13 L. J. Q. B. 107.

⁵ *Citizens Life Assur. Co. v. Brown*, [1904] A. C. 423; *Nevill v. Fine Arts, &c. Co.*, [1895] 2 Q. B. 156; *Whitfield v. S. East. Rail. Co.*, *supra*.

⁶ In *Kelly v. Mid. G. W. Rail. Co.*, 1872, Ir. 7 C. L. 8, and in *Abrath v. N. E. Rail. Co.*, 1886, 11 App. Cas. 247, *Id. Bramwell* in *H. L.* expressed grave doubts whether an action for malicious prosecution could be maintained against a corporation aggregate. Notwithstanding this, it is believed that the general opinion is that such an action may be maintained, and it was so held (*Pollock, B.*) in *Kent v. Courage & Co.*, 1891, 55 J. P. 264. And see, also, *Bank of New South Wales v. Owston*, 1879, 4 App. Cas. 270 (P. C.); and *Edwards v. Midl. Rail. Co.*, 1880, 9 Q. B. D. 287 (*Fry, J.*).

⁷ *Mayor, &c. of Manchester v. Williams*, [1891] 1 Q. B. 94.

⁸ *May. of Stafford v. Till*, 1827, 4 Bing. 75; *Dean and Ch. of Rochester*

the use and occupation of premises; and one is probably maintainable *against* it,¹ whenever it has *actually* occupied the plaintiff's premises, although no demise under seal has been executed. This, however, seems to rest on the peculiar language and object of the statute enabling landlords to bring such a form of action,² and does not extend to cases of mere constructive holding.³

§§ 981a—
984.

§ 982. The question as to how far, in applying the rule, that the seal of a corporation is generally required to its contract, a distinction can be recognised between executed and executory contract, has been much discussed and the old decisions on the subject were confessedly irreconcilable. The old Court of Queen's Bench—apparently shocked at the gross injustice that might be perpetrated if a corporate body, after having received the benefit under a contract, were to be allowed to refuse to pay on the ground that the contract was not under seal, on several occasions decided that the objection could not be taken where the corporation had received the whole consideration for which it had bargained.⁴

§ 983. In the Chancery Courts, too, it has been held that corporations may be bound by acquiescence in a continuing contract.⁵

§ 984. On the other hand, the old Court of Exchequer more than once held that a corporation is not precluded from relying on the absence of a seal, when works have been *executed* under a parol contract, even though such works have received the approval of the corporation, which enjoyed the full benefit of them.⁶ And the old Common Pleas held that a solicitor, who had been appointed, but not under seal, by the mayor and town

v. Pierce, 1808, 1 Camp. 466; *Southwark Bridge Co. v. Sills*, 1826, 2 C. & P. 371; *May. of Carmarthen v. Lewis*, 1834, 6 C. & P. 608. See *Doe v. Bold*, 1847, 11 Q. B. 127.

¹ *Finlay v. Bristol & Ex. Rail. Co.*, 1852, 21 L. J. Ex. 117; *Lowe v. Lond. & N. West. Rail. Co.*, 1852, 21 L. J. Q. B. 361. See ante, § 974.

² 11 G. 2, c. 19 ("The Distress for Rent Act, 1737"), § 14, amended by "The Statute Law Revision Act, 1888" (51 V. c. 3).

³ *Finlay v. Bristol & Ex. Rail. Co.*, 1852, 21 L. J. Ex. 117.

⁴ *Sanders v. St. Neots' Union*,

1846, 8 Q. B. 810; *Clarke v. Cuckfield Union*, 1851-52, 21 L. J. Q. B. 349; *Beverley v. Lincoln Gas Co.*, 1837, 6 A. & E. 829; *Nicholson v. Bradford Union*, 1866, L. R. 1 Q. B. 620; *Doe v. Taniere*, 1848, 12 Q. B. 998.

⁵ *Crook v. Corporation of Seaford*, 1871, L. R. 6 Ch. 551.

⁶ *Lamprell v. Billericay Union*, 1849, 18 L. J. Ex. 282. See, also, *Diggle v. Lond. & Blackwall Rail. Co.*, 1850, 19 L. J. Ex. 308; *Homer-sham v. Wolverh. Waterw. Co.*, 1851, 6 Ex. 137; *May. of Ludlow v. Charlton*, 1840, 9 C. & P. 242.

§§ 984— council of a borough to conduct suits, could not recover costs
985. incurred in such suits.¹

§ 984A. The question has, however, been recently before the Court of Appeal in a case² in which the plaintiff, an engineer, brought an action against a Rural District Council for remuneration for services rendered at their request in regard to a scheme for sewerage contemplated by them, and for other work in connection therewith. The contract was not under seal, but the work had been entirely executed by the plaintiff. The Court after reviewing the previous decisions, adopted and approved those in the Court of Queen's Bench above referred to; and laid down the rule that where the purposes for which a corporation is created render it necessary that work should be done or goods supplied to carry those purposes into effect, and orders are given by the corporation in relation to work to be done or goods to be supplied to carry those purposes into effect, then, if the work done or goods supplied are accepted by the corporation and the whole consideration for payment is executed a contract to pay will be implied from the acts of the corporation, and the absence of a contract under the seal of the corporation will be no answer to an action brought in respect of the work done or the goods supplied. The decision in this case it will be noticed is strictly limited to cases in which the contract upon which the action is brought is wholly executed upon one side, and as to how far, if at all, a plaintiff can recover in an action upon a contract made by a corporation not under seal which has been only partly executed there appears to be still no authoritative decision, but it is submitted that a plaintiff in such a case would be entitled to recover on a *quantum meruit* for the price of the goods or work which had been actually accepted.

§ 985. Another instance in which the law requires that a

¹ *Arnold v. May*. of Poole, 1842, 12 L. J. C. P. 97. See, also, *Clemenshaw v. Corp. of Dublin*, 1875, Ir. R. 10 C. L. 1.

² *Lawford v. Billericay Rural Council*, [1903] 1 K. B. 772. In America it is held that where a corporation makes a contract which is *ultra vires* or unsealed, of which

the defendant has already had the benefit, the remedy of the aggrieved party is to disaffirm the contract, and sue upon a *quantum meruit* for the value of the work done; see *Brunswick Gas, &c., Co. v. United Gas Co.*, 1893, 35 Am. St. R. 385; and also *Kadish v. Garden City, &c.*, 1894, 42 Am. St. R. 256.

transaction shall be evidenced *by deed* is where an agent is employed to execute a deed for his principal, for, in this case, the authority must be given by an instrument under seal.¹ But such an instrument, or power of attorney, *transfers* no interest, the agent or attorney being merely put thereby in the place of the principal. The deed which the agent is authorised to execute must consequently be executed by the agent in the name and as the act of him who gave the power.² Neither can a parol ratification, not amounting to a re-delivery,³ by the principal in a deed executed by his agent give validity to the deed, when the agent has not been authorised to act by an instrument under seal;⁴ though it seems that evidence of an express, if not of an implied, recognition or adoption of the deed by the principal, will, as against him, raise a presumption that the agent was thus formally authorised to act, so as to dispense with the necessity of proving that fact.⁵

§§ 985—
987-8.

§ 986. There are, moreover, some cases in which deeds are rendered necessary by *statute law*. For example, transfers of shares in *companies incorporated by Act of Parliament* are by the Companies Clauses Consolidation Act, 1845,⁶ required to be by *deed* duly stamped, in which the consideration shall be duly stated; and such deed may be according to the form given by the Act, or to the like effect. But, singularly enough, there exists no provision requiring transfers of shares in companies *incorporated under the Joint Stock Companies Act*,⁷ to be made by deed.

§ 987-8. On the other hand, some exceptions have been created by statute to the common law rule which requires that the contracts of corporations shall be made by deed. Thus, with regard to the contracts of companies incorporated by Act of Parliament since its date, it is, by the Companies Clauses

¹ *Berkeley v. Hardy*, 1826, 5 B. & C. 355; *White v. Cuyler*, 1795, 6 T. R. 176; *Steiglitz v. Egginton*, 1815, Holt, N. P. R. 141; *Williams v. Walsby*, 1803, 4 Esp. 220; *Callaghan v. Pepper*, 1840, 2 Ir. Eq. R. 399.

² *Hunter v. Parker*, 1840, 10 L. J. Ex. 281 (Parke, B.); *M'Ardle v. Irish Iodine Co.*, 1864, 15 Ir. C. L. R. 146 (Ir.).

³ *Tupper v. Foulkes*, 1861, 30 L. J. C. P. 214.

⁴ *Hunter v. Parker*, 1840, 10 L. J. Ex. 281.

⁵ *Tupper v. Foulkes*, 1861, 30 L. J. C. P. 214. But see *Id. Gosford v. Robb*, 1845, 8 Ir. L. R. 217.

⁶ 8 & 9 V. c. 16, § 14. This Act regulates all companies which have been incorporated by Act of Parliament since its date.

⁷ Such incorporation is now effected under 25 & 26 V. c. 89, 1st Sch. Table A, No. 9.

§§ 987-8
—989.

Consolidation Act, 1845,¹ provided that “the powers which may be granted to any committee [of directors] to make contracts, as well as the power of the directors to make contracts on behalf of the company, may lawfully be exercised as follows:—that is to say, With respect to any contract, which, if made between private persons, would be by law required to be in writing and under seal, such committee, or the directors, may make such contracts on behalf of the company in writing and under the common seal of the company, and in the same manner may vary or discharge the same: With respect to any contract, which, if made by private persons, would be by law required to be in writing, and signed by the parties to be charged therewith, then such committee, or the directors, may make such contract on behalf of the company in writing, signed by such committee, or any two of them, or any two of the directors, and in the same manner may vary or discharge the same: With respect to any contract, which, if made between private persons, would by law be valid, although made by parol only, and not reduced into writing, such committee, or the directors, may make such contract on behalf of the company by parol only without writing, and in the same manner may vary or discharge the same. And all contracts made according to the provisions herein contained shall be effectual in law, and shall be binding upon the company and their successors, and all other parties thereto, their heirs, executors, or administrators, as the case may be; and on any default in the execution of any such contract, either by the company or any other party thereto, such actions or suits may be brought, either by or against the company, as might be brought had the same contracts been made between private persons only.” Under the above section, it may, from the fact of sleepers having been actually received and used by a railway company, in pursuance of a contract made with an agent of the company upon certain terms, be inferred by a jury that the directors agreed on behalf of the company to accept the goods on the terms which had been so agreed.²

§ 989. Another exception to the common law rule requiring the contracts of corporations to be under seal, arises in the case

¹ 8 & 9 V. c. 76, § 97.

² *Pauling v. Lond. & N. West Rail. Co.*, 1853, 23 L. J. Ex. 105.

of contracts by joint-stock companies which have been registered under the Companies Act.¹ These may be made in nearly the same manner as contracts by companies incorporated by Act of Parliament passed in or since 1845.² Special provisions, too, exist as to the making, accepting, or indorsing of promissory notes or bills of exchange on account of such companies,³ and also with respect to the execution abroad of deeds made on their behalf.⁴ Moreover, the memoranda of association, by which joint-stock companies are incorporated, and the articles of association, by which the affairs of such companies may be regulated, are not required to be executed under seal; but after registration they become as binding as deeds on every shareholder who has signed them in the presence of a single attesting witness.⁵

§§ 989—
991.

§ 990. Returning to the consideration of instances in which particular evidence (by document or otherwise) of particular transactions is required by statute, the following further instances are to be noted.

§ 991. A *deed* was, by the Act to simplify the transfer of property,⁶ rendered necessary in all cases of partitions, exchanges,

¹ 25 & 26 V. c. 89. 30 & 31 V. c. 131, § 37 (adopting the repealed 19 & 20 V. c. 47, § 41), enacts, that "contracts on behalf of any company registered under the Act of 25 & 26 V. c. 89, may be made as follows; (that is to say),

"(1.) Any contract which if made between private persons would be by law required to be in writing, and if made according to English law to be under seal, may be made on behalf of the company in writing under the common seal of the company, and such contract may be in the same manner varied or discharged:

"(2.) Any contract which if made between private persons would be by law required to be in writing, and signed by the parties to be charged therewith, may be made on behalf of the company in writing signed by any person acting under the express or implied authority of the company, and such contract may in the same manner be varied or discharged:

"(3.) Any contract which if made between private persons would by

law be valid, although made by parol only, and not reduced into writing, may be made by parol on behalf of the company by any person acting under the express or implied authority of the company, and such contract may in the same way be varied or discharged:

"And all contracts made according to the provisions herein contained shall be effectual in law, and shall be binding upon the company and their successors, and all other parties thereto, their heirs, executors, or administrators, as the case may be." See *Eley v. The Positive Governm. &c. Co.*, 1875, 45 L. J. Ex. 58.

² As to which see *supra*, §§ 987-8.

³ 25 & 26 V. c. 89 ("The Companies Act, 1862"), § 47. See *Peruvian Rail. Co. v. Thames and Mersey Mar. Ins. Co.*, 1867, L. R. 2 Ch. 617.

⁴ *Id.* § 55; 27 & 28 V. c. 19 ("The Companies Seals Act, 1864").

⁵ By 25 & 26 V. c. 89 ("The Companies Act, 1862"), §§ 11, 16.

⁶ 7 & 8 V. c. 76. This Act was,

§§ 991—
993.

assignments, or surrenders in writing of freehold or leasehold lands, or of leases in writing of freehold, copyhold, or leasehold lands,¹ where the transfer has been effected between the 1st of January,² and the 1st of October,³ 1845.

§ 992. It has, moreover, been enacted⁴ “that after the 1st day of October, 1845, all corporeal tenements and hereditaments shall, as regards the conveyance of the immediate freehold thereof, be deemed to lie in grant as well as in livery;” or, in other words, shall pass by the delivery of the deed of conveyance, in the same manner as incorporeal hereditaments have heretofore passed. It is further enacted,⁵ “that a *feoffment*, made after the said 1st day of October, 1845, other than a feoffment made under a custom by an infant, shall be void at law, unless evidenced by deed; and that a *partition* and an *exchange* of any tenements or hereditaments not being copyhold—and a *lease*, required by law to be in writing,⁶ of any tenements or hereditaments—and an *assignment of a chattel interest*, not being copyhold, in any tenements or hereditaments,—and a *surrender* in writing of an interest in any tenements or hereditaments, not being a copyhold interest, and not being an interest which might by law have been created without writing,—made after the 1st of October, 1845, shall also be void at law, unless made by deed: Provided always, that the said enactment, so far as the same relates to a release⁷ or a surrender, shall not extend to Ireland.”

§ 993. This enactment is of little practical importance as to feoffments, partitions, exchanges, assignments, and surrenders, since, before its passing, transfers effecting these were almost invariably by deed. With respect, however, to *leases*, it proved highly beneficial;⁸ for by requiring all demises for a period

within a year of its passing, repealed by 8 & 9 V. c. 106 (“The Real Property Act, 1845”).

¹ 7 & 8 Vict. c. 76, §§ 3 and 4; *Burton v. Revell*, 1847, 16 L. J. Ex. 85; *Doe v. Moffatt*, 1850, 19 L. J. Q. B. 438.

² 7 & 8 V. c. 76, § 13.

³ 8 & 9 V. c. 106 (“The Real Property Act, 1845”), § 1.

⁴ *Id.* § 2.

⁵ *Id.* § 8.

⁶ See post, § 1001.

⁷ This is obviously a misprint for “lease;” but the blunder has been remedied by 23 & 24 V. c. 154, § 104, and Sched. B. (Ir.), which repeats, so far as Ireland is concerned, that part of § 3 of 8 & 9 V. c. 106, which relates to leases, assignments, and surrenders.

⁸ The statute does not apply to agreements for letting tolls of turnpike roads under 3 G. 4, c. 126,

§§ 993,
994.

exceeding three years¹ to be under seal, it gradually diminished, and at last dried up, that fruitful source of litigation, which used to spring from the difficulty of distinguishing between an actual lease and an agreement for a lease. The effect of the statute was that *in law* the party taking possession of land under a lease or agreement for a period exceeding three years, not under seal, was a mere tenant at will, liable to become, by the payment and acceptance of rent, a tenant from year to year, and thenceforth to be subject to all those stipulations in the agreement which are applicable to such a tenancy.² But although the statute provided that such leases should be *void at law* unless made by deed, the Courts of Equity by the application of the doctrine of part performance, held that any person who had given or taken possession under a lease or agreement capable of specific performance, although such lease or agreement was void *at law* under the statute, was not only entitled to specific performance of the agreement by the execution of a valid lease, but was to be treated in equity as actual lessor or lessee upon the terms of the lease agreed to be granted from the time possession was taken. Since the passing of the Judicature Acts the rules of equity now prevail in all the Courts, the result, therefore, now is that in all cases where a tenant has entered into possession under a lease or agreement for a lease void at law, but of which under the circumstances stated above, specific performance can be enforced,³ he is considered to hold upon the same terms as if a valid lease had actually been granted.⁴

§ 994. Although leases for any term exceeding three years are void at law unless granted by deed, an equally formal instrument is not required for the purpose of confirming those leases, which are invalid by reason of some deviation from the terms of the

§§ 55, 57: *Shepherd v. Hodsman*, 1852, 21 L. J. Q. B. 263, recognised (Byles, J.) in *Markham v. Standford*, 1863, 14 C. B. N. S. 380.

¹ A lease for eighteen months, with power to lessee, by giving a month's notice, to prolong the term for a further period of two years, is not within the meaning of the statute: *Hand v. Hall*, 1877, 46 L. J. Ex. 603 (C. A.).

² *Martin v. Smith*, 1874, L. R. 9 Ex. 50. See post, § 1001, ad fin.

³ *Coatsworth v. Johnson*, 1886, 55 L. J. Q. B. 220.

⁴ *Walsh v. Lonsdale*, 1882, 21 Ch. D. 9; and see *Althasen v. Brooking*, 1884, 26 Ch. D. 559; *In re Maughan*, 1885, 14 Q. B. D. 956; *Lowther v. Heaves*, 1889, 41 Ch. D. 248; *Zimble v. Abrahams*, [1903] 1 K. B. 577.

§§ 994— power under which they were granted; for it is expressly
997. enacted,¹ that the *confirmation*, which shall suffice to establish the validity of any such defective lease, “may be by memorandum or note in writing signed by the persons confirming and accepting respectively, or by some other persons by them respectively thereunto lawfully authorised.”

§ 995. By “The Public Health Act, 1875,” all contracts, “whereof the value or amount exceeds 50*l.*,” which shall be made by an urban sanitary authority, *must* be in writing, and be sealed with the common seal of such authority.² “The Public Health (Ireland) Act, 1878,” contains a similar clause.³

§ 995*A*. Debentures issued under the Mortgage Debenture Acts of 1865 and 1870 must be deeds.⁴

§ 996. Secondly.⁵ As regards writings not under seal. It is in many cases (for the most part by statute) required that certain transactions be in writing.

§ 997. Thus absolute assignments of debts and other choses in action must be made “by writing under the hand of the assignor.”⁶ If express notice in writing of any such assignment

¹ By 13 & 14 V. c. 17, § 3.

² 38 & 39 V. c. 55, § 174, subs. 1. See *Hunt v. Wimbledon Local Bd.*, 1878, 3 C. P. D. 208; *Eaton v. Basker*, 1881, 6 Q. B. D. 201; 7 Q. B. D. 529; *Young v. Leamington, Corp.* of, 1883, 8 Q. B. D. 597; 8 App. Cas. 517; *Att.-Gen. v. Gaskill*, 1882, 20 Ch. D. 519.

³ 41 & 42 V. c. 52, § 201, subs. 1, (Ir.).

⁴ 28 & 29 V. c. 78; 33 & 34 V. c. 20, § 15. But debentures, stock certificates to bearer, or annuity certificates issued in pursuance of “The Local Loans Act, 1875,” will, it seems, be valid, if duly signed, without the impression of any seal (38 & 39 V. c. 83, § 22). Under this last Act, debentures, stock certificates, and annuity certificates, when respectively payable to bearer, are transferable by delivery (*Id.* §§ 5, 6, 7); while what are called “nominal securities” must be transferred “by writing in manner directed by the local authority” (*Id.*). Irrespective of the statute law, debentures under the seal of a corporation will not, as

it seems, be regarded as promissory notes, or even as negotiable instruments, though they may be drawn in express terms as payable to bearer. *Crouch v. Crédit Foncier of Engl.*, 1873, L. R. 8 Q. B. 374.

⁵ *Supra*, §§ 273-4.

⁶ As to what will amount to an assignment of a debt, see *Buck v. Robson*, 1878, 3 Q. B. D. 686; and to the assignment of a chose in action, see *Brice v. Bannister*, 1878, 3 Q. B. D. 569; *Ex p. Hall*, *Re Whitting*, 1878, 10 Ch. D. 615; *Walker v. Bradford Old Bk.*, 1884, 12 Q. B. D. 511. See, also, *Tancred v. Delagoa Bay Rail. Co.*, 1889, 23 Q. B. D. 239. As to what will amount to an *absolute* assignment, see *Durham Bro. v. Robertson*, [1898] 1 Q. B. 765; *Mercantile Bank v. Evans*, 1899, 2 Q. B. 613; *Hughes v. Pump House Hotel Co.*, [1902] 2 K. B. 190. As to what are *debts* or *choses in action* assignable under the Judicature Act, see *Dawson v. Great Northern and City Ry.*, [1905] 1 K. B. 260; *May v. Lane*, 1895, 64 L. J. Q. B. 236; *Earl's*

be given to the debtor, trustee, or other person liable, such assignment will, from the date of the notice, transfer the legal right to the assignee.¹ §§ 997—998a.

§ 998. The assignment of a copyright of a book is, again, not valid unless it be in writing.² The law is the same as to an assignment of any patent, or of any copyright in a registered design or trade mark.³

§ 998A. The *sale* of a British *ship* or of any share therein, is also required⁴ to be in writing, it being enacted that “(1) a registered ship or a share therein (when disposed of to a person qualified to own a *British* ship) shall be transferred⁵ by bill of sale; (2) the bill of sale shall contain such description of the ship as is contained in the surveyor’s certificate, or some other description sufficient to identify the ship to the satisfaction of the registrar, and shall be in the form marked A. in the First Part of the First Schedule to this Act, or as near thereto as circumstances permit, and shall be executed by the transferor in the presence of, and be attested by, a witness or witnesses.”⁶ This enactment⁷ applies as well to an executory contract for the sale, as to the absolute sale, of a ship.⁸ It renders an actual bill of sale necessary.⁹ Such bill of sale must usually be executed by

Shipbuilding Co. v. Atlantic Transport Co., 1899, 43 S. J. 691; Jones v. Humphries, 1902, 1 K. B. 10.

¹ “The Judicature Act, 1873” (36 & 37 V. c. 66), § 25, subs. 6; 40 & 41 V. c. 57, § 28, subs. 6, (Ir.). See Burlington v. Hall, 1884, 12 Q. B. D. 347.

² Leyland v. Stewart, 1876, 4 Ch. D. 419; Jewitt v. Eckhardt, 1878, 8 Ch. D. 404 (Jessel, M.R.). See post § 1110.

³ See 5 & 6 V. c. 45 (“The Copyright Act, 1842”); 46 & 47 V. c. 57 (“The Patents, Designs and Trade Marks Act, 1883”), § 87; amended by 51 & 52 V. c. 50, § 21, and cases cited in last note.

⁴ 57 & 58 V. c. 60 (“The Merchant Shipping Act, 1894”), § 24. This applies only to British ships. Union Bk. of London v. Lenardon, 1878, 3 C. P. D. 348.

⁵ As to how a ship may be mortgaged, and the effect on it of an un-

registered mortgage, see Keith v. Burrows, 1876, 1 C. P. D. 722.

⁶ The bill of sale does not require a stamp: 54 & 55 V. c. 39 (“The Stamp Act, 1891”), Sched. tit. “General Exemptions (2).”

⁷ As to provisions formerly in force (8 & 9 V. c. 89, § 34), see Duncan v. Tindal, 1853, 22 L. J. C. P. 137; Hughes v. Morris, 1852, 21 L. J. Ch. 761; M’Calmont v. Rankin, 1852, 22 L. J. Ch. 554.

⁸ Batthyany v. Bouch, 1881, 50 L. J. Q. B. 421; where the Court declined to follow Liverpool Borough Bk. v. Turner, 1860, 30 L. J. Ch. 379. See also Chapman v. Callis, 1861, 30 L. J. C. P. 241; Stapleton v. Haymen, 1865, 33 L. J. Ex. 170.

⁹ Though under the old law any instrument in writing which recited the certificate of registry was sufficient: Hunter v. Parker, 1840, 10 L. J. Ex. 281.

§§ 998a— the transferor himself, in the presence of a witness or witnesses.¹
 1000. When a registered owner is desirous of selling or mortgaging an interest in a ship at a place out of the country, the registrar can allow the power of sale or mortgage to be exercised on the registered owner's behalf by another person, previously mentioned by the owner to the registrar, and whose name has been entered by the latter on the register.² Lastly, it is at least doubtful whether any description of vessel used in navigation, not propelled by oars,³ can be sold without a bill of sale, though boats under fifteen tons burthen might, prior to that date, have been transferred by parol,⁴ and though such vessels do not now require to be registered, if solely employed in river or coast navigation.⁵

§ 999. It is also required that an assignment of a policy of insurance be made by indorsement on the policy.⁶ The assignee under an assignment so made may sue on the policy in his own name.⁷ The statute, while furnishing a short form of indorsement,⁸ leaves it uncertain whether it must not be sealed as well as signed. An assignment under this Act may be made after a loss by the perils insured against.⁹ In practice the Act has been rendered unnecessary by those provisions of the Judicature Act which have been already set out.¹⁰

§ 1000. The most important of the Acts requiring the transactions specified in them to be in writing or by deed (as the case may be) is, however, the "*Statute of Frauds*," which has been extended to Ireland,¹¹ and has also been enacted, generally in the same words, in nearly all the United States.¹² Lord Nottingham

¹ See 57 & 58 V. c. 60 ("The Merchant Shipping Act, 1894"), § 24.

² See 57 & 58 Vict. c. 60 ("The Merchant Shipping Act, 1894"), §§ 39, 40. Formerly a ship might be transferred by an agent acting under a parol authority. But now the proper form must be used, and the directions in the certificate of registry strictly followed: *Orr v. Dickenson*, 1858, 28 L. J. Ch. 516; *Hunter v. Parker*, 1840, 10 L. J. Ex. 281.

³ See § 742 of "The Merchant Shipping Act, 1894" (57 & 58 V.

c. 60), tit. "Ship"; and § 24.

⁴ *Benyon v. Cresswell*, 1848, 18 L. J. Q. B. 1.

⁵ As to this, see 57 & 58 V. c. 60, § 2. See, also, id. §§ 3, 77, sub-s. 6; § 692, sub-s. 3; § 745, sub-s. 1 E.

⁶ See "The Policies of Marine Insurance Act, 1868" (31 & 32 V. c. 86), § 2.

⁷ *Id.* § 1.

⁸ *Id.* Sched. The form ends with the words "In witness whereof," &c.

⁹ *Lloyd v. Fleming*, 1872, W. N. 6.

¹⁰ *Supra*, § 997.

¹¹ By 7 W. 3, c. 12.

¹² 29 C. 2, c. 3 (which by "The

framed it with the assistance of Sir Leoline Jenkins and Lord Hale.¹ Its noble author declared that every line of it was *worth* a subsidy,²—and the present generation may add that every line of it has *cost* a subsidy.³ The⁴ rules of evidence contained in this statute, are, for the most part, well calculated for the exclusion of perjury, by requiring, in the cases there mentioned, some more satisfactory evidence than mere oral testimony affords. The statute dispenses with no proof of consideration, which was previously required, and gives no efficacy to written contracts, which they did not previously possess.⁵ Its policy is to impose such requisites upon private transfers of property, as, without being hindrances to fair transactions, may either be totally inconsistent with dishonest projects, or may tend to multiply the chances of detection.⁶ The scope of the present work will only allow a notice of the rules of evidence, which the statute has introduced.

§§ 1000,
1001.

§ 1001. By the provisions of the Statute of Frauds, as since amended, all *leases*, estates, and interests in lands,⁷ created by livery and seisin only,—that is by mere matter in pais, without deed,⁸—or by parol and not put in writing, and signed by the parties creating the same, or their agents duly authorised in writing, have only the force and effect of estates at will; except leases for terms not exceeding three years at a rent amounting to two-thirds of the improved value.⁹ It seems, though the point is

Short Titles Act, 1892" (55 V. c. 10), legally received the title by which it is cited above). See, also, 4 Kent, Com. 95, and n. b (4th edit.). The Civ. Code of Louis. art. 2415, without adopting in terms the provisions of the Stat. of Frauds, declares generally, that all verbal sales of immovable property shall be void: 4 Kent, Com. 450, n. a (4th edit.).

¹ 3 Campbell's Lives of the Chancellors, 418.

² R. North's Life of Guildford, 209.

³ In Doe v. Harris, 1838, 8 A. & E. 12, Ld. Denman speaks of the Statute of Frauds as "one of the wisest laws in principle, though far from being complete in its details, or fortunate in its execution."

⁴ Gr. Ev. § 262, almost verbatim.

⁵ 2 St. Ev. 472; Rann v. Hughes (in H. L. and undated, but between

1764 and 1797, 7 T. R. 350 n.); Barrell v. Trussell, 1811), 4 Taunt. 121.

⁶ Rob. on Frauds, Pref. xxii. A learned note, at p. 359 of the 15th edit. (1892) of Greenleaf, points out various systems of law in which the principle of the Statute of Frauds may be traced, and also that the Roman law required written evidence in every one of the cases in which it is rendered necessary by the Statute of Frauds, citing N. De Lescut De Exam. Testium, 26 (Farinae. Op. Tom. II., App. 243).

⁷ Prior to 1st January, 1845, when 7 & 8 V. c. 76, came into operation (see ante, § 991), various of these could be created by parol.

⁸ See per Patteson, J., and Ld. Denman, in Cooch v. Goodman, 1842, 2 Q. B. 580.

⁹ The actual words of "The Statute

§ 1001. not wholly free from doubt, that the statute is not applicable to *demises under seal*;¹ and consequently, that an indenture of lease for more than three years need not be signed. It has been said that the tenancy described as "*an estate at will*," must be construed as a tenancy from year to year;² but this is not strictly accurate; since a party who enters under an agreement void by the statute is, in point of law, tenant at will at first, though, like any other tenant at will, he will be converted into a tenant from year to year, as soon as a rent measured by the year or portions of it has been paid and accepted.³ In both characters he will be subject to such of the terms of the agreement as are not inconsistent with the species of tenancy which the law under the circumstances creates.⁴ Therefore, if one of the terms be that the tenant shall keep the premises in repair during his occupation,⁵ or that he shall paint in the seventh year of his tenancy,⁶ or that

of Frauds" (29 C. 2, c. 3, § 1), are that "all leases, estates, interests of freehold or terms of years, or any uncertain interest of, in, to, or out of any messuages, manors, lands, tenements, or hereditaments, made or created by livery and seisin only, or by parol, and not put in writing, and signed by the parties so making or creating the same, or their agents thereunto lawfully authorised by writing, shall have the force and effect of leases or estates at will only, and shall not, either in law or equity, be deemed or taken to have any other or greater force or effect; any consideration for making any such parol leases or estates, or any former law or usage, to the contrary notwithstanding." § 2 "excepts, nevertheless, all leases not exceeding the term of three years from the making thereof, whereupon the rent reserved to the landlord, during such term, shall amount unto two third parts at the least of the full improved value of the thing demised." These provisions were enacted in § 1 of 7 W. 3, c. 12, Ir.; but that section has been repealed since the 1st Jan., 1861, see 23 & 24 V. c. 154 (§§ 104, 105, and Sch. B. Ir.); and § 4 of the last-mentioned Act now regulates the law in Ireland, enacting that "every lease or contract with

respect to lands, whereby the relation of landlord and tenant is intended to be created for any freehold estate or interest, or for any definite period of time, not being from year to year or any lesser period, shall be by deed executed, or note in writing signed, by the landlord, or his agent thereunto lawfully authorised in writing." See *Bayley v. M. of Conyngham*, 1863, 15 Ir. C. L. R. 406; *Chute v. Busteed*, 1862-3, 14 Ir. C. L. R. 115.

¹ *Aveline v. Whisson*, 1842, 12 L. J. C. P. 158; *Shep. Touch*, 56, n. 24; *Cooch v. Goodman*, 1842, 2 Q. B. 580; *Cherry v. Heming*, 1849, 19 L. J. Ex. 63. *Contra*, 2 Bl. Com. 306.

Clayton v. Blakey, 1798, 8 T. R. 3; 2 Smith, L. C. 118; *Berrey v. Lindley*, 1841, 11 L. J. C. P. 27.

² *Richardson v. Gifford*, 1834, 1 A. & E. 50; 2 Smith, L. C. 110, 111.

³ *Berrey v. Lindley*, 1841, 11 L. J. C. P. 27; *Doe v. Bell*, 1793, 5 T. R. 471; *Arden v. Sullivan*, 1850, 19 L. J. Q. B. 268. See *Tooker v. Smith*, 1857, 1 H. & N. 732.

⁴ *Richardson v. Gifford*, 1834, 1 A. & E. 50. See *Beale v. Sanders*, 1837, 3 Bing. N. C. 850; *Arden v. Sullivan*, 1850, 19 L. J. Q. B. 268.

⁵ *Martin v. Smith*, 1874, L. R. 9 Ex. 50.

he shall pay his rent in advance,¹ he will be liable to an action for a breach of any such stipulation, notwithstanding the agreement itself is made void by the statute. §§ 1001—1003.

§ 1002. Although a parol lease for a longer period than the Act permits is inoperative as to its duration, still, if a tenant holds under it during the entire period, he may quit *without notice* at the expiration of the term contemplated by the void demise.² The term³ of three years, for which a parol lease may be good, must, on the other hand, be computed from the date of the agreement; and a term of three years to commence in futuro will consequently not satisfy the statute.⁴ If a parol lease is made, to hold from year to year during the pleasure of the parties, this is adjudged to be a lease for only one year certain, and every subsequent year is a new springing interest, arising upon the first contract, and parcel of it; so that if the tenant should occupy ten years, still it is prospectively but a lease for a year certain, and therefore good, within the exception of the statute; though, as to the time past, it is considered as one entire and valid lease for so many years as the tenant has enjoyed it.⁵

§ 1003.⁶ By the *third* section of the same statute,⁷ no leases, estates, or interests, either of freehold, or terms of years, or any uncertain interest, not being copyhold or customary interest, in messuages, manors, lands, tenements, or hereditaments, could,—prior to the first of January, 1845,⁸—be *assigned, granted, or surrendered*, unless by deed, or note in writing, signed by the party

¹ *Lee v. Smith*, 1854, 23 L. J. Ex. 198.

² *Berrey v. Lindley*, 1841, 11 L. J. C. P. 27; *Doe v. Stratton*, 1828, 3 C. & P. 164; *Doe v. Moffatt*, 1850, 19 L. J. Q. B. 438; *Tress v. Savage*, 1854.

³ Gr. Ev. § 263, in part.

⁴ *Rawlins v. Turner*, 1699, 1 Ld. Raym. 736.

⁵ Rob. on Frauds, 241—244.

⁶ Gr. Ev. § 264, in part.

⁷ “The Statute of Frauds” (29 C. 2, c. 3). 7 W. 3, c. 12, § 1, Ir. was to the like effect; but that section has been repealed since the 1st Jan., 1861, see 23 & 24 V. c. 154, §§ 104, 105, and Sch. B., Ir. The law in Ireland is now contained in §§ 7 and 9 of the Act just cited. § 7 enacts, that “the estate or interest of any

tenant under any lease or other contract of tenancy shall not be *surrendered* otherwise than by a deed executed, or note in writing signed, by the tenant or his agent thereto lawfully authorised in writing, or by act and operation of law.” § 9 enacts, that “the estate or interest of any tenant in any lands under any lease or other contract of tenancy, shall be *assigned, granted, or transmitted* by deed executed, or instrument in writing signed, by the party assigning or granting the same, or his agent thereto lawfully authorised in writing, or by devise, bequest, or act and operation of law, and not otherwise.”

⁸ When 7 & 8 V. c. 76, came into operation. See ante, §§ 991—993.

§§ 1003,
1004.

so assigning, granting, or surrendering the same, or his agent authorised by writing, or by act and operation of law. At common law, surrenders of estates for life or years in possession in things corporeal were good, though made by parol; but things incorporeal, as advowsons, rent, and the like, and interests in lands not in possession, as remainders and reversions for life or years, lying *in grant*, could not, and still cannot, be surrendered except by deed.¹ The effect of this section is not to dispense with any evidence required by the common law; but to add to its provisions somewhat of security, by requiring a new and a more permanent species of evidence. Wherever, therefore, at common law a deed was necessary, the same solemnity is still requisite under this Act; but with respect to lands and tenements in possession, which, before the statute, might have been surrendered by words only, some note in writing, duly signed, is by the statute made essential to a valid surrender.²

§ 1004. This section does not contain,—like the first two sections of the Act,—any exception in favour of leases not exceeding the term of three years; and, consequently, it excludes alike parol assignments and parol surrenders of mere leases from year to year, though such leases have been created by verbal agreement.³ It seems, also, that a parol agreement by a lessee, for the transfer of his interest in a term not exceeding three years, which is intended to take effect as an *assignment*, and is invalid as such, cannot operate as an *underlease*.⁴ If, however, both parties *intend* to create the relation of landlord and tenant, the mere fact of the parol demise passing all the lessor's interest in the premises will not prevent it from operating as a lease, at least for some purposes.⁵ The lessor, therefore, under these special circumstances, may sue the lessee as for use and occupation during the entire term, even should such lessee quit the premises before

¹ Co. Lit. 337 b, 338 a; 2 Shep. Touch. 330; 1 Wms. Saund. 236 a; Lyon v. Reed, 1844, 13 L. J. Ex. 377; ante, §§ 973-4.

² Rob. on Frauds, 248.

³ Botting v. Martin, 1808, 1 Camp. 317; Mollett v. Brayne, 1809, 2 Camp. 103; Thomson v. Wilson, 1818, 2 Stark. 379. See Doe v.

Wells, 1839, 10 A. & E. 435.

⁴ Barrett v. Rolfe, 1845, 14 L. J. Ex. 308; questioning Poultney v. Holmes, 1733-4, 1 Str. 405.

⁵ Pollock v. Stacy, 1847, 16 L. J. Q. B. 133; upholding Poultney v. Holmes, 1733-4, 1 Str. 405. But see Beardman v. Wilson, 1868, L. R. 4 C. P. 57.

its expiration ;¹ and this, too, although the lessor, in consequence of having no reversion, cannot distrain for the rent in arrear.² §§ 1004—1006.

§ 1005. The *surrender by act and operation of law*, mentioned in the statute, is a phrase to which it is difficult to assign a precise meaning. Its most obvious application is, “to cases where the owner of a particular estate has been a party to some Act, the validity of which he is by law afterwards estopped from disputing, and which would not be valid if his particular estate had continued to exist. There the law treats the doing of such act as amounting to a surrender. Thus, if a lessee for years accept a new lease from his lessor, he is estopped from saying that his lessor had not power to make the new lease ; and, as the lessor could not do this until the prior lease had been surrendered, the law says that the acceptance of such new lease is of itself a surrender of the former. So, if there be a tenant for life, remainder to another in fee, and the remainder-man comes on the land and makes a feoffment to the tenant for life, who accepts livery thereon, the tenant for life is thereby estopped from disputing the seisin in fee of the remainder-man ; and so the law says, that such acceptance of livery amounts to a surrender of his life estate. Again, if a tenant for years accepts from his lessor a grant of a rent, issuing out of the land, and payable during the term, he is thereby estopped from disputing his lessor’s right to grant the rent ; and as this could not be done during his term, therefore he is deemed in law to have surrendered his term to the lessor.”³ In all these cases no question of *intention* can arise. The surrender is not the result of intention, but is the act of the law, and it takes place independently, and even in spite of, intention the most express.⁴

§ 1006. Neither is it material, whether the new interest taken by the surrenderor, be or be not equivalent to that enjoyed under the surrendered term. Therefore, if a lessee for life, or for a long term of years, accepts from his landlord a new demise for a shorter period, this will amount to a surrender of his original

¹ Pollock v. Stacy, 1847, 16 L. J. Q. B. 133.

1786, 1 T. R. 441.

² Parmenter v. Webber, 1818, 8 Taunt. 593 ; Smith v. Mapleback,

³ Lyon v. Reed, 1844, 13 L. J. Ex. 377.

⁴ Id.

§§ 1006,
1007.

lease.¹ The better opinion now is, that nothing short of an express demise will operate as a surrender of an existing lease,² and the doctrine that a tenancy under a lease would be surrendered by operation of law, if the parties were to make a verbal agreement, for a sufficient consideration, that, instead of the existing term, there should be a tenancy from year to year at a different rent, or even a tenancy at will,³ has been much shaken. Still, it is not necessary that the new demise should in all events be incapable of being defeated. For example, if a lessee were to accept *in accordance with his contract*, a second lease voidable upon condition, this, even in the event of its avoidance, would amount to a surrender of the former term; because such second lease would pass ab initio the actual interest contracted for, though that interest would be liable to be defeated at some future period.⁴

§ 1007. On the other hand, the acceptance of a *void* lease, which creates no new estate whatever,⁵ or even the acceptance of a *voidable* lease, which, being afterwards made void *contrary to the intention* of the parties, does not pass an interest *according to the contract*, will not operate as a surrender of a former lease.⁶ Nor will it make any difference whether the surrender be express or implied; for as was once observed,⁷ "In the case of a surrender implied by law from the acceptance of a new lease, a condition ought also to be understood as implied by law, making void the surrender in case the new lease should be made void; and in case of an express surrender, so expressed as to show the intention of the parties to make the surrender only in consideration of

¹ *Mellow v. May*, 1601, Moo. F. 636; recognised (Holroyd, J.) in *Hamerton v. Stead*, 1824, 2 B. & C. 478; and (Lefroy, B.) in *Lynch v. Lynch*, 1843, 6 Ir. L. R. 142.

² *Foquet v. Moor*, 1852, 22 L. J. Ex. 35; *Crowley v. Vitty*, 1852, 21 L. J. Ex. 135.

³ See cases cited in note ¹, supra.

⁴ *Roe v. Abp. of York*, 1805, 6 East, 86; *Doe v. Bridges*, 1831, 1 B. & Ad. 847; *Doe v. Poole*, 1848, 17 L. J. Q. B. 143; *Fulmerston v. Steward*, 1554, Plowden 107 a (*Bromley, C.J.*); *Co. Lit.* 45 a; *Lloyd v. Gregory*, 1638, Cro. Car.

501; *Whitley v. Gough*, 1556-7. Dyer 140.

⁵ *Roe v. Abp. of York*, 1805, 6 East, 86; explained (*Abbott, C.J.*) in *Hamerton v. Stead*, 1824, 2 B. & C. 478; *Lynch v. Lynch*, 1843, 6 Ir. L. R. 142 (*Lefroy, B.*); *Wilson v. Sewell*, 1766, 4 Burr. 1980; *Davison v. Stanley*, 1768, 4 Burr. 2213 (*Ld. Mansfield*).

⁶ *Doe v. Poole*, 1848, 17 L. J. Q. B. 143; *Doe v. Courtenay*, 1848, 17 L. J. Q. B. 151.

⁷ *Doe v. Courtenay*, 1848, 17 L. J. Q. B. 151; overruling *Doe v. Forwood*, 1842, 11 L. J. Q. B. 321.

the grant, the sound construction of such instrument, in order to effectuate the intention of the parties, would make that surrender also conditional to be void, in case the grant should be made void.” §§ 1007—1009.

§ 1008. The mere fact of a tenant entering into an agreement to *purchase* the estate will not, moreover, work a surrender of his tenancy by operation of law; because such a contract contains an implied condition that the landlord should make out a good title; and it would be most unreasonable to suppose, that the tenant intended absolutely to surrender an existing term, while it was uncertain whether the purchase would be completed or not.¹ If, however, from the peculiar wording of the agreement, it could fairly be inferred that the tenant from its date was to be absolutely a debtor for the purchase-money, paying interest upon it, and to cease to pay rent, a tenancy at will would probably be created after that time; and the acceptance of such new demise would then operate as a surrender of the former interest.² An agreement between a landlord and tenant during the existence of a lease, that the former should lay out money on the premises, and the latter pay an additional rent in consequence, does not create a new tenancy at an increased rent, so as to amount to a surrender of the old lease by operation of law.³

§ 1009.⁴ The simple *cancellation* of a lease, even though both parties consent,⁵ cannot work a surrender by operation of law, to divest the tenant's estate, because the intent of the statute is to take away the mode of transferring interests in lands by symbols and words only, as formerly used; and therefore, a surrender by cancellation, which is but a sign, is also taken away; though a symbolical surrender may perhaps be still recognised in certain cases as the basis of equitable relief.⁶ This

¹ Doe v. Stanion, 1835, 5 L. J. Ex. 253; Tarte v. Darby, 1846, 15 L. J. Ex. 326.

² Doe v. Stanion, 1836, as reported 1 M. & W. 701.

³ Donellan v. Read, 1832, 3 B. & Ad. 905; Lambert v. Norris, 1837, 6 L. J. Ex. 109.

⁴ Gr. Ev. § 265, slightly.

⁵ Id. Ward v. Lumley, 1860, 29

L. J. Ex. 322.

⁶ Magennis v. MacCullough (undated) Gilb. (Eq. R.) 236; Roe v. Abp. of York, 1805, 6 East, 86; Wootley v. Gregory, 1828, 2 Y. & J. 536; Bolton v. Bp. of Carlisle, 1793, 2 H. Bl. 263; Doe v. Thomas, 1829, 9 B. & C. 299; Walker v. Richardson, 1837, 6 L. J. Ex. 229; Natchbolt v. Porter, 1839, 2 Vern. 112; 4

§§ 1009,
1010.

rule seems equally to apply, whether the cancelled deed relates to things lying in livery, or to those which lie only in grant.¹ Neither will the fact of the lease being found cancelled in the possession of the lessor, furnish in itself any presumption of an actual surrender by deed or note in writing; though it may be a circumstance fit for the consideration of the jury, if coupled with proof that the lessee has been out of possession for a series of years, or that the lessor's papers have been destroyed, or that other occurrences may account for, or excuse, the non-production of the written surrender.²

§ 1010. Though the doctrine of surrender by operation of law was originally confined to cases where the tenant accepted from his lessor, a new interest, inconsistent with that which he previously had, it has been considerably extended by modern decisions. It is now applied, not only to the case where the second lease is granted to the lessee himself, or to the lessee and his wife, or to the lessee and a stranger,³ but to any act done by the landlord, which creates a new interest in a third party, inconsistent with the tenant's former interest; provided the tenant and third party concur in such act, and the former *actually gives up possession* in consequence of it.⁴ For example, a demise by the lessor to a stranger, with the lessee's assent, coupled with an actual change of possession, is a surrender by operation of law of the lessee's interest, at least, if it be merely a chattel interest.⁵ Whether a similar doctrine would apply to

Kent, Com. 104; Rob. on Frauds, 251, 252; id. 248, 249; Holbrook v. Tirrell, 1829, 9 Rick 109.

¹ Bolton v. Bp. of Carlisle, 1793, 2 H. Bl. 263; Walker v. Richardson, 1837, 6 L. J. Ex. 229.

² Doe v. Thomas, 1829, 9 B. & C. 299; Walker v. Richardson, 1837, 6 L. J. Ex. 229; ante, § 138.

³ Shep. Touch. 301; Hamerton v. Stead, 1824, 2 B. & C. 478.

⁴ Thomas v. Cook, 1818, 2 B. & Ald. 119; Stone v. Whiting, 1817, 2 Stark R. 235; Dodd v. Acklom, 1843, 13 L. J. C. P. 11; Lynch v. Lynch, 1843, 6 Ir. L. R. 142; Walker v. Richardson, 1837, 6 L. J. Ex. 229; Davison v. Gent, 1856, 26 L. J. Ex. 122; Grimman v.

Legge, 1828, 8 B. & C. 324; Bees v. Williams, 1835, 2 C. M. & R. 581; Graham v. Whichelo, 1832, 2 L. J. Ex. 70; Reeve v. Bird, 1834, 3 L. J. Ex. 282; Hall v. Burgess, 1826, 5 B. & C. 332; Nickells v. Atherstone, 1847, 16 L. J. Q. B. 371; M'Donnell v. Pope, 1852, 9 Hare, 705.

⁵ Cases cited in last note. In Doe v. Wood, 1845, 15 L. J. Ex. 41, tenant from year to year having died, leaving his widow in possession, and A. having some time after taken out administration, the widow continued in possession paying rent within A.'s knowledge, without his objection. It was held that these facts did not amount to a surrender on A.'s part, by operation of law,

a case where the former lessee had a freehold interest admits of doubt. The Irish Court of Exchequer¹ held that it would, but that decision has been much shaken, if not overruled.² But in the case of a leasehold interest, although a parol licence to quit, even when followed by an actual quitting, will not of itself operate as a surrender of the tenant's interest;³ yet if the tenant, in pursuance of such a licence, gives up possession, and the landlord accepts it, the licence, coupled with the change of possession, will amount to a surrender by operation of law, and the landlord will not be able to recover any rent becoming due after his acceptance of the possession.⁴

§§ 1010,
1011.

§ 1011. The modern extension of this doctrine of surrender, explained in the early part of the preceding section, was questioned by Lord Wensleydale, who suggested that the cases on which it apparently rests may be supported on the ground that the occupation of the premises by the landlord's new tenants might "have the effect of eviction by the landlord himself, in superseding the rent or compensation for use and occupation during the continuance of that occupation."⁵ Several of the cases may certainly be explained in this manner; and one was expressly decided on a somewhat similar ground.⁶ But in the leading authority on the subject,⁷ this point was neither suggested in argument, nor alluded to by the court. Moreover, in a case,⁸ which was much discussed in Ireland, the point could not have been taken at all, it being an action of ejectment brought by the former lessees for life, against the party who, with their consent, had been substituted in their place by the landlord. And the

and that A., on proof of deceased's tenancy and death, and his own title as administrator, could recover in ejectment against the widow.

¹ In *Lynch v. Lynch*, 1843, 6 Ir. L. R. 142.

By *Ld. St. Leonards in Creagh v. Blood*, 1845, 3 J. & La T. 133 (Ir.).

² *Mollett v. Brayne*, 1809, 2 Camp. 103. See, also, *Doe v. Milward*, 1838, 7 L. J. Ex. 57; and *Johnstone v. Hudlestone*, 1825, 4 B. & C. 932.

⁴ *Grimman v. Legge*, 1828, 8 B. & C. 324; *Dodd v. Acklom*, 1843, 13

L. J. C. P. 11; *Phene v. Popplewell*, 1862, 31 L. J. C. P. 235; *Whitehead v. Clifford*, 1814, 5 Taunt. 518. See *Cannan v. Hartley*, 1850, 19 L. J. C. P. 323; *Oastler v. Henderson*, 1877, 2 Q. B. D. 575 (C. A.).

⁵ *Lyon v. Reed*, 1844, 13 L. J. Ex. 377.

⁶ *Gore v. Wright*, 1838, 8 A. & E. 118.

⁷ *Thomas v. Cook*, 1818, 2 B. & Ald. 119.

⁸ *Lynch v. Lynch*, 1843, 6 Ir. L. R. 142.

§§ 1011— old Courts of Queen's Bench¹ and Exchequer² both declared
1013. their dissent from the line of argument advanced by Lord
Wensleydale, and confirmed the doctrine laid down in the leading
case above referred to,³ that the rule rests upon the fact that the
tenant voluntarily assents to an actual change in the possession.

§ 1012. On the whole it is submitted that the rule, as stated
in the two preceding sections, is good law; and that, confined,
as it is, to cases where an actual, and consequently a notorious,
shifting of possession has occurred, no danger need be apprehended
from its continuance. Its adoption, however, where
reversions or incorporeal hereditaments, which pass only by
deed, are disposed of, or its extension to cases where corporeal
estates are dealt with by the consent of the tenant, but no actual
change of possession takes place, would certainly let in all the
dangers for avoiding which the statute was passed. In such
cases Lord Wensleydale's observation that the application of the
rule would very seriously affect titles to long terms of years has
much force. In mortgage terms, for instance, it frequently
happens that there is a consent, express or implied, by the legal
termor to a demise from the mortgagor to a third person.⁴
However, as in such cases the rule as to surrenders implied by
operation does not at present apply,⁵ nothing further need be said
on the subject.

§ 1013. A surrender by operation of law may be effected under
the provisions of particular Acts of Parliament. For instance,
the Bankruptcy Acts empower⁶ the trustee of a bankrupt lessee
to relieve himself from all responsibility under the lease, by
simply disclaiming it in writing under his hand,⁷ provided he do

¹ Nickells v. Atherstone 1847, 16 L. J. Q. B. 371.

² Davison v. Gent, 1856, 26 L. J. Ex. 122.

³ Thompson v. Cooke, 1818, 2 B. & Ald. 119.

⁴ Lyon v. Reed, 1844, 13 L. J. Ex. 377.

⁵ Lyon v. Reed, 1844, 13 L. J. Ex. 377, as to estates lying in grant; Doe v. Johnston, 1825, Mc. Cl. & Y. 141, as to the assent of the tenant, when not coupled with change of possession; recognised in Dodd v. Acklom, 1843, 13 L. J. C. P. 11. In

Walker v. Richardson, 1837, 6 L. J. Ex. 229, there was a lease of tolls, but the point that this was a right which lay in grant was never taken.

⁶ 46 & 47 Vict. c. 52, § 55.

⁷ A trustee who has taken possession of the leasehold property of the bankrupt cannot divest himself of personal liability to the landlord for the rent, except in the mode indicated in the text: In re Solomon, ex parte Dressler, 1878, 9 Ch. D. 252 (C. A.). See, also, Wilson v. Wallani, 1880, 5 Ex. D. 155; and Lowrey v. Barker, 1880, 5 Ex. D. 170 (C. A.).

so with the leave¹ of the Court of Bankruptcy, within twelve² §§ **1013—1015.**
 months after his appointment, and within twenty-eight days after the lessor has applied to him to decide whether he will disclaim or not; and upon the execution of such disclaimer³ the lease is deemed to have been surrendered on the date thereof, and the lessor is deemed to be a creditor of the bankrupt to the extent of any injury he may have sustained by the operation of this enactment, and he may prove the same as a debt under the bankruptcy.⁴ The trustee of a bankrupt may, in like manner, get rid of any shares or stock in companies, unprofitable contracts, or unsaleable property, which have passed to him under the Bankruptcy Act, and this, too, notwithstanding he may have taken possession of such property, or exercised any act of ownership over it.⁵ Somewhat similar provisions will also be found in "The Irish Bankrupt and Insolvent Act, 1857,"⁶ and "The Bankruptcy, Ireland, Amendment Act, 1872."⁷ Under the Building Societies Act, 1874, also, the society may indorse on any mortgage given to them by a member a receipt under their seal, and countersigned by the secretary or manager and such receipt will have the effect of vacating the security, and of vesting the property comprised therein in the party entitled to the equity of redemption, without any reconveyance.⁸ "The Industrial and Provident Societies Act, 1893,"⁹ and "The Friendly Societies Act, 1896,"¹⁰ contain similar enactments.

§ 1014. The law no longer allows any *merger* by operation of law only of any estate, the beneficial interest in which would not be deemed to be merged or extinguished in equity.¹¹

§ 1015. *Assignments by operation of law* may be effected in

¹ Leave to disclaim is not required in all cases. See "Bankruptcy Rules, 1883," r. 232.

² See 53 & 54 V. c. 71 ("The Bankruptcy Act, 1890"), § 13.

³ But this disclaimer will not affect the rights of third parties: *Ex parte Walton*, re Levy, 1881, 17 Ch. D. 756 (C. A.). See also, 46 & 47 V. c. 52, § 55, sub-sect. 2.

⁴ 46 & 47 V. c. 52, § 55 (amended by 53 & 54 V. c. 71, § 13), and § 56; *In re Hide*, 1871, L. R. 7 Ch. 28 (C. A.). A trustee, after disclaimer, cannot remove fixtures: *In re Lavies*,

ex parte Stephens, 1877, 7 Ch. D. 127 (C. A.). See *In re Roberts*, *ex parte Brook*, 1879, 10 Ch. D. 100 (C. A.).

⁵ *Id.* §§ 55, 56.

⁶ 20 & 21 V. c. 60, §§ 271, 272 (Ir.).

⁷ 35 & 36 V. c. 58, §§ 97, 98 (Ir.).

⁸ 37 & 38 V. c. 42, § 42; *Harvey v. Munic. &c. Building Soc.*, 1884, 26 Ch. D. 273 (C. A.).

⁹ 56 & 57 V. c. 39, § 43.

¹⁰ 59 & 60 V. c. 25, § 53, subs. (1).

¹¹ 36 & 37 V. c. 66 ("The Judicature Act, 1873"), § 25, subs. 4; 40 & 41 V. c. 57, § 28, subs. 4, Ir.

§ 1015. a variety of ways. For instance, when a lessor owner in fee dies intestate, the reversion vests in his heir at law, and when a lessee dies intestate, the lease vests in his administrator, by operation of law. Nay, as against himself, even an executor de son tort may be treated as the assignee of a lease. In all these cases, when an action is brought against the heir, or administrator, or executor de son tort, it will probably be sufficient to charge in the statement of claim that the reversion or lease respectively came to the defendant "by assignment thereof then made."¹ And by the Conveyancing and Law of Property Act, 1881, an estate or interest of inheritance in any hereditaments on the death of the trustee or mortgagee, notwithstanding any testamentary disposition, vests, like a chattel real, in his legal personal representative.² The chattels real of any woman married before the 27th of August, 1870,³ or even between that date and the 1st of January, 1883,⁴ may be said, in the absence of a settlement, to have been assigned to her husband by operation of law.⁵ Women married since the latter date are, however, entitled to hold as their separate estate all the real and personal property belonging to them at the time of marriage.⁶ When, too, a person is adjudged a *bankrupt*, his property, whether real or personal, in or out of England, present or future, vested or contingent,⁷ becomes vested, without any deed of assignment or conveyance, in the trustee upon his appointment;⁸ and on the death, resignation, or removal of any such trustee, and the appointment of another in his stead, a similar vesting takes place.⁹ So, when the affairs of a debtor are being

¹ *Paull v. Simpson*, 1846, 15 L. J. Q. B. 382; *Derisley v. Custance*, 1790, 4 T. R. 75.

² 44 & 45 V. c. 41, § 30.

³ When "The Married Women's Property Act, 1870" (33 & 34 V. c. 93), came into operation.

⁴ When "The Married Women's Property Act, 1882" (45 & 46 V. c. 75), came into operation.

⁵ See *Ashworth v. Outram*, 1877, 5 Ch. D. 923, C. A.

⁶ 45 & 46 V. c. 75 ("The Married Women's Property Act, 1882"), §§ 1, 2.

⁷ 46 & 47 V. c. 52 ("The Bank-

ruptcy Act, 1883"), § 168. See *Stanton v. Collier*, 1854, 23 L. J. Q. B. 116; *Beckham v. Drake*, 1847-9, 2 H. L. C. 579, H. L.; *Rogers v. Spence*, 1846, 12 Cl. & Fin. 700, H. L.; *Herbert v. Sayer*, 1844, 13 L. J. Q. B. 209; *Jackson v. Burnham*, 1852, 22 L. J. Ex. 13.

⁸ 46 & 47 V. c. 52, § 54. See, as to the Irish law, 20 & 21 V. c. 60, §§ 267, 268, Ir.

⁹ *Id.* § 54, subs. 3. See, as to the Irish law, 20 & 21 V. c. 60, §§ 267, 268, Ir.; 35 & 36 V. c. 58, § 121, r. 5, Ir.

settled by composition, or scheme of arrangement, all his property vests in the trustee from the date of his appointment.¹ In the same way, where an official receiver is removed, dies, or resigns, all estates, rights, and powers, vested in him, without any conveyance or transfer, vest in such official receiver as the Board of Trade may appoint.² Under "The Friendly Societies Act, 1896," too, upon the death, resignation or removal of a trustee, the property vested in him vests in his successor without conveyance or assignment.³ Upon the appointment, again, of an administrator of a convict's property, all the estate of the convict therein becomes vested in such official,⁴ and remains so vested till the expiration of the sentence, when it reverts in the convict or his representative.⁵ In connection with this subject it may be noted, too, that though a parol assignment by a sheriff of leasehold premises, taken in execution under a *fieri facias*, is void at law, even where the assignee has entered and paid rent to the head landlord, and though the execution debtor consequently at law may still regain possession of the premises in an action to recover land against the assignee,⁶ there appears ground for contending that if the latter plead the facts by way of defence on equitable grounds, he may possibly be enabled to support the assignment and so defeat his opponent.

§ 1016.⁷ It is further required by the Statute of Frauds that the declaration or creation of *trusts* of land⁸ shall be manifested by some writing, signed by the party "who is by law enabled to declare such trust;"⁹ and that all grants and assignments of any such trust shall also be in writing, signed in the same manner.¹⁰

¹ See 53 & 54 V. c. 71 ("The Bankruptcy Act, 1890"), § 3, subs. 17, and § 43 of "The Bankruptcy Act, 1883" (46 & 47 V. c. 52). See, as to the Irish law, 35 & 36 V. c. 58, § 91, *Ir.*

² Bankruptcy Rules, 1886, r. 322, subs. 2.

³ 59 & 60 V. c. 25, § 50.

⁴ 33 & 34 V. c. 23 ("The Forfeiture Act, 1870"), § 10.

⁵ § 18.

⁶ *Doe v. Jones*, 1842, 9 M. & W. 372.

⁷ Gr. Ev. § 266, in part.

⁸ Trusts of personalty are not

affected by the statute. Greenleaf on Ev., 15th edit. (1892), note to § 266.

⁹ These words refer to the *beneficial*, and not to the mere *legal* owner of the estate. *Tierney v. Wood*, 1854, 23 L. J. Ch. 895; *Kronheim v. Johnson*, 1877, 7 Ch. D. 60.

¹⁰ By 29 C. 2, c. 3 ("The Statute of Frauds"), § 7, as amended by "The Statute Law Revision Act" (51 V. c. 3), "all declarations or creations of trusts or confidences, of any lands, tenements, or hereditaments, shall be manifested and proved by some

§§ 1016— The statute does not require that the trust itself should be created
1017a. by writing; but only that it should be *manifested* by writing; plainly meaning that documentary evidence should be forthcoming, to prove first the existence, and next the nature of the trust.¹ A letter acknowledging the trust, and *à fortiori*, an admission in an answer in Chancery, is therefore sufficient to satisfy the statute.² An employment by a person of another to bid for him at an auction is within the statute.³ Declarations of trust otherwise than of land are not required to be so evidenced,⁴ and may be shown in various ways.⁵

§ 1017.⁶ *Resulting trusts*, which arise by implication of law, are specially excepted from the operation of the Act.⁷ Trusts of this nature may be reduced to three classes.

§ 1017A. The first class of resulting trusts is where an estate is purchased in the name of one person, but the purchase-money is paid by another,⁸—and here, it matters not whether the legal estate be freehold, copyhold, or leasehold; whether it be taken in the names of the purchaser and others jointly, or in the names of others, without that of the purchaser; or in one name, or in several, jointly or successive. In all such cases a trust will result

writing signed by the party who is by law enabled to declare such trust, or by his last will in writing, or else they shall be utterly void and of none effect."

By § 8, "where any conveyance shall be made of any lands or tenements by which a trust or confidence shall or may arise or result by the implication or construction of law, or be transferred or extinguished by an act or operation of law, then, and in every such case, such trust or confidence shall be of the like force and effect as the same would have been if this statute had not been made; anything hereinbefore contained to the contrary notwithstanding."

By § 9 "all grants and assignments of any trust or confidence shall likewise be in writing, signed by the party granting the same, or by such last will or devise, or else shall likewise be utterly void and of none effect." See the corresponding Irish Act of 7 W. 3, c. 12, §§ 10, 11, 12.

¹ *Smith v. Matthews*, 1861, 30 L. J. Ch. 445. See *Booth v. Turle*, 1873, L. R. 16 Eq. 182; *Dye v. Dye*, 1884, 47 J. P. 520 (C. A.).

² *Forster v. Hale*, 1798, 3 Ves. 696; *Randall v. Morgan*, 1805, 12 Ves. 67; *Rob. on Frauds*, 95; *Sug. V. & P.* 700; 4 Kent, Com. 305.

³ *James v. Smith*, 1890, 63 L. T. 524.

⁴ See, as to these, notes as to executed and executory trusts to *Glenorchy v. Bosville*, 1733, *Cases Temp. Talbot*, 3; 1 *White & Tudor, Lead. Cas.*, vol. i. p. 1; as to voluntary trusts, to *Ellison v. Ellison*, 1802, 6 Ves. 656, id. 291; as to constructive trusts, to *Keech v. Sandford*, 1776, *Select Cas. in Ch.* 61, id. 53; as to resulting trusts, to *Dyer v. Dyer*, 1788, id. 236.

⁵ *In re Vernon, Ewens & Co.*, 1886, 32 Ch. D. 165 (C. A.).

⁶ *Gr. Ev.* § 266, in part.

⁷ See n. 2, *supra*.

⁸ *Lloyd v. Spillet*, 1740, 2 Atk. 150 (*Ld. Hardwicke*).

to the man who advances the purchase-money,¹ unless such a resulting trust would break in upon the policy of some statute,² or unless the purchase be effected by a father,³ or perhaps a mother,⁴ in the name of an unprovisioned child, legitimate or illegitimate,⁵ or in the joint names of the purchaser and such child,⁶ or of such child and another person.⁷ In the case of the purchase by a parent, the trust, in the absence of clear evidence to the contrary,⁸—and the parent's subsequent declarations cannot furnish such evidence,⁹—will not be deemed a resulting trust for the purchaser, but a gift or advancement for the child;¹⁰ because parents are bound in conscience to provide for their children.¹¹

§ 1017B. The second class of cases in which resulting trusts arise is where a conveyance is made in trust, declared only as to part, and the residue remains undisposed of, nothing being declared respecting it.

§ 1017C. The third class of resulting trusts arises in cases of fraud; as for instance when one person, by any species of fraud, gets into his possession property belonging to another.¹²

§ 1018. In all cases of resulting trusts, parol evidence,—though received with great caution, and not deemed sufficient unless of a clear character,¹³—is admissible to establish the collateral facts (not contradictory to the deed, unless in the case of fraud), from

¹ *Dyer v. Dyer*, 1788 (Eyre, C.B.); *Sug. V. & P.* 701; *Wray v. Steele*, 1814, 2 Ves. & B. 388; *Baxter v. Brown*, 1845, 7 M. & Gr. 215.

² *Ex parte Houghton*, 1810, 17 Ves. 251; *Redington v. Redington*, 1794, 3 Ridg. P. C. 106.

³ The doctrine probably extends to a purchase by any person who stands in loco parentis, *Powys v. Mansfield*, 1836-7, 7 L. J. Ch. 9.

⁴ But, in the case of a mother, the equitable presumption must be supported by some evidence of intention, *Bennet v. Bennet*, 1879, 10 Ch. D. 474 (Jessel, M.R.), commenting on *Sayre v. Hughes*, 1868, L. R. 5 Eq. 376 (Stuart, V.-C.); and *In re De Visme*, 1864, 33 L. J. Ch. 332.

⁵ *Beckford v. Beckford*, 1774, Lofft. 490; *Sug. V. & P.* 703. See *Soar v. Foster*, 1858, 4 K. & J. 152; *Tucker v. Burrow*, 1865, 34 L. J. Ch. 478.

⁶ *Fox v. Fox*, 1863, 15 Ir. Ch. R. 89; *Sidmouth v. Sidmouth*, 1840, 9 L. J. Ch. 282.

⁷ *Lamplugh v. Lamplugh*, 1709, 1 P. Wms. 112.

⁸ *Stock v. M'Avoy*, 1872, L. R. 15 Eq. 55 (Wickens, V.-C.).

⁹ *O'Brien v. Sheil*, 1873, Ir. R. 7 Eq. 255.

¹⁰ See *Forrest v. Forrest*, 1865, 34 L. J. Ch. 428; *Hepworth v. Hepworth*, 1870, L. R. 11 Eq. 10.

¹¹ *Sug. V. & P.* 703. See *Devoy v. Devoy*, 1858, 26 L. J. Ch. 290; *Jeans v. Cooke*, 1857, 27 L. J. Ch. 202; *Dumper v. Dumper*, 1862, 3 Giff. 583; *Williams v. Williams*, 1863, 32 Beav. 370.

¹² *Lloyd v. Spillet*, 1740, 2 Atk. 150 (I.d. Hardwicke).

¹³ *Wilkins v. Stephens*, 1842, 1 Y. & C. Ch. 431; *Groves v. Groves*, 1829, 3 Y. & J. 170.

§§ 1018—
1020.

which a trust may legally result;¹ and it makes no difference as to its admissibility whether the nominal purchaser be living or dead.² It was, indeed, once doubted whether parol evidence is admissible against the answer of the trustee denying the trust.³ But there is no sufficient reason for such doubt.⁴ As a resulting trust may be established by parol evidence, it may also be rebutted by the same species of proof. Parol evidence will, therefore, be admitted to prove the purchaser's intention, that the person to whom the conveyance was made should take beneficially,⁵ and where circumstances render it probable that a gift was intended, the presumption of a resulting trust may be even rebutted by the sole testimony of the party interested in supporting the gift.⁶

§ 1019. § 4 of the Statute of Frauds,⁷ like § 1,⁸ would seem inapplicable to deeds.⁹ By it no action shall be brought whereby to charge any executor or administrator upon any special promise to answer damages out of his own estate; or any person upon any special promise to answer for the debt, default, or miscarriage of another; or upon any agreement made in consideration of marriage; or upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them; or upon any agreement that is not to be performed within one year from the making thereof; unless the *agreement*, upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorised.¹⁰

§ 1020. The provisions of § 17 of the Statute of Frauds have

¹ *Marshal v. Crutwell*, 1875, L. R. 20 Eq. 328.

² Sug. V. & P. 701, 702; 2 Story, Eq. Jur. § 1201, n.; *Lench v. Lench*, 1805, 10 Ves. 517; 3 Law Mag. 131—139; 4 Kent, Com. 305; *Boyd v. M'Lean*, 1815, 1 Johns. Ch. R. 582 (Am.); *Pritchard v. Brown*, 1828, 4 New Hamp. 307 (Am.); *Goodwin v. Hubbard*, 1818, 15 Mass. 218, n. (Am.).

³ Sug. V. & P. 702.

⁴ 3 Law Mag. 136—138; *Bartlett v. Pickersgill*, 1759-60, 4 East, 577, n.

⁵ Sug. V. & P. 702; *Edwards v. Edwards*, 1836, 2 Y. & C. Ex. R. 123; *Brady v. Cubitt*, 1778, 1 Doug. 31; *Beecher v. Major*, 1865, 2 Drew.

& Sm. 431; *Goodright v. Hodges*, 1773, 2 East, 534, n.

⁶ *Fowkes v. Pascoe*, 1875, L. R. 10 Ch. 343 (C. A.).

⁷ Viz., "The Statute of Frauds," or 29 C. 2, c. 3, as amended by "The Statute Law Revision Act, 1888" (51 V. c. 3); § 7 of 7 W. 3, c. 12 (Ir.), corresponds with this section.

⁸ Ante, § 1001.

⁹ *Cherry v. Heming*, 1849, 19 L. J. Ex. 63.

¹⁰ As to the meaning of these last words, see *Norris v. Cooke*, 1857, 30 L. T. (Ir.) 224; *Smith v. Webster*, 1876, 3 Ch. D. 49 (C. A.). *Griffiths Cycle Corp. v. Humber & Co.*, [1899] 2 Q. B. 414.

been repealed by "The Sale of Goods Act, 1893."¹ The last-mentioned Act provides² that a contract for the sale of any goods³ of the *value*⁴ of *ten pounds* or upwards, shall not be enforceable by action unless the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract be made and signed by the party⁵ to be charged, or his agent⁶ in that behalf. It is expressly provided⁷ that these provisions of "The Sale of Goods Act, 1893," shall extend to every such contract, "notwithstanding that the goods may be intended to be delivered at some future time, or may not at the time of such contract be actually made, procured, or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery."

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1021.

§ 1021. The meaning of § 4 of the Statute of Frauds is substantially the same⁸ as that of § 4 of "The Sale of Goods Act, 1893." To satisfy either enactment, the *consideration* for the *agreement* in the one case, and for the *bargain*⁹ in the other, must,

¹ 56 & 57 V. c. 71, § 60. § 21 of 7 W. 3, c. 12, Ir., corresponded with this section.

² 56 & 57 V. c. 71, § 4, sub-sect. 1.

³ "The Statute of Frauds" here added, "wares or merchandise." By its interpretation clause (§ 62), the word "goods" in "The Sale of Goods Act, 1893," includes "all chattels personal other than things in action and money, and in Scotland all corporeal moveables except money. The term includes emblements, industrial growing crops, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale."

⁴ "The Statute of Frauds" here said, *for the price* of ten pounds or upwards." The changed language is not important, in view of the change made by Lord Tenterden's Act as long ago as 1828, and sub-sect. 2 of § 4.

⁵ A. signed a contract to buy a ship of B. B. altered the contract, signed it and returned it to A., who thereupon assented by parol to the alteration, but did not resign. Held,

that the Statute was satisfied: *Steward v. Eddowes*, 1874, L. R. 9 C. P. 311.

⁶ One party to a contract cannot sign the name of the other as his agent, so as to bind him within the statute: *Sharman v. Brandt*, 1871, L. R. 6 Q. B. 720 (Ex Ch.). Neither, in the absence of express authority, can the vendor's traveller sign the bargain in the purchaser's name as his agent: *Murphy v. Boese*, 1875, L. R. 10 Ex. 126. See post, § 1109.

⁷ 56 & 57 V. c. 71, repealing (§ 60) and re-enacting (§ 4, sub-sect. 2) a similar provision originally contained in Lord Tenterden's Act of 1828 (9 G. 4, c. 14, § 7), and extended to Ireland by § 21 of 7 W. 3, c. 12 (Ir.).

⁸ *Kenworthy v. Schofield*, 1824, 2 B. & C. 947.

⁹ The price must be stated if actually agreed: *Elmore v. Kingscote*, 1826, 5 B. & C. 583; but not if the sale is for an implied reasonable price: *Hoadley v. M'Laine*, 1834, 10 Bing. 482; *Egerton v. Mathews*, 1805, 2 Smith, 389. See *Jenkins v. Reynolds*, 1821, 3 B. & B. 21; *Hunt v. Adams*, 1809, 5 Mass. 360 (Am.). By the Sale of Goods Act, 1893, it is

**§§ 1021,
1022-3.**

—except in the case of a special promise made by one person to answer for the debt, default, or miscarriage of another,¹—appear expressly or impliedly in writing signed by the party to be charged, or by his agent. This requirement applies, not only to bargains for the sale of goods, to agreements upon consideration of marriage,² to contracts for the sale or lease of lands, and to agreements not to be performed within a year;³ but also to special promises made by executors or administrators to answer damages out of their own estate. This doctrine is held with a view of effectuating the object of the statute. Instead, however, of preventing, it has, to a great extent, increased, the commission of fraud. Many of the States of America,⁴ influenced by these considerations, have repudiated it as highly impolitic; and some argue that the Legislature of this country should adopt similar views.

§§ 1022-3. At present, however, the doctrine prevails in full force both in England and in Ireland (except as to guarantees⁵). But it is somewhat qualified by the further doctrine that the consideration need not be stated on the face of the written memorandum in *express* terms; but will sufficiently appear if it can be collected, not indeed by mere conjecture, however plausible,⁶ but

provided, § 8: (1) "The price in a contract of sale may be fixed by the contract, or may be left to be fixed in manner thereby agreed, or may be determined by the course of dealing between the parties. (2) Where the price is not determined in accordance with the foregoing provisions, the buyer must pay a reasonable price. What is a reasonable price is question of fact dependent on the circumstances of each particular case."

¹ As to this, see 19 & 20 V. c. 97 ("The Mercantile Law Amendment Act, 1856"), § 3, cited post, § 1030b.

² See *Saunders v. Cramer*, 1842, 3 Dr. & War. 187 (Ir.).

³ *Lees v. Whitcomb*, 1828, 5 Bing. 34; *Sykes v. Dixon*, 1839, 9 A. & E. 693; *Sweet v. Lee*, 1841, 3 M. & Gr. 452.

⁴ For example, it is stated (Gr. Ev. § 268, n.) that the English rule is followed in New York and New Hampshire, but that it has been rejected in Massachusetts, first by the

State court, in *Packard v. Richardson*, 1821, 17 Mass. 122 (Am.), and subsequently by the Legislature of the State—the revised stat. c. 74, § 2, providing, that the consideration of the promise, contract, or agreement, need not be set forth in the writing signed by the party to be charged therewith, but may be proved by any other legal evidence; that the rule is also rejected in Maine (*Levy v. Merrill*, 1826, 4 Greenl. 180 (Am.)); in Connecticut (*Sage v. Wilcox*, 1826, 6 Conn. 81 (Am.)); in New Jersey (*Buckley v. Beardslee*, 1819, 2 South. 570 (Am.)); in North Carolina (*Miller v. Irvine*, 1834, 1 Dever & B. 103 (Am.)); and in South Carolina (*Fyler v. Givens*, 1835, Riley, Law Cas. 56, 62 (Am.)). The writer also refers to *Violett v. Patton*, 1809, 6 Cranch. 142 (Am.); *Taylor v. Ross*, 1832, 3 Yerg. 330 (Am.); 3 Kent, Com. 122.

⁵ As to which, see post, § 1030b.

⁶ *Hawes v. Armstrong*, 1835, 1 Bing. N. C. 765; *James v. Williams*,

by fair and reasonable, if not necessary, intendment from the whole tenor of the writing.¹ § 1024.

§ 1024. It is, however, essential to the validity of the written document, that all the material² terms of the contract, and the promise,³ should be stated therein, either directly or by reference.⁴ For example, an agreement for a lease must contain all the essential terms of the lease; and therefore, if it cannot be discovered from it at what date the tenancy is to commence, the document will be rejected as not satisfying the requirements of the statute.⁵ Still, any memorandum will suffice, which, employing mere general language, without condescending to minute particulars, contains all that leads to future certainty. For instance, if a man undertake in writing to purchase a particular article at a named price, this will satisfy the statute, though it be agreed at the same time that the article in question shall have some alteration or addition made to it before delivery.⁶ When, too, an auctioneer has signed a memorandum, acknowledging the receipt from A. B. of 21*l.* as deposit on property belonging to C. D., purchased at 420*l.* on a certain day at a named place, this is a sufficient description of a house that has been sold by auction, parol evidence being admissible to identify the particular premises;⁷ and where by a contract in writing a vendor agreed to sell and a purchaser to buy "twenty-four acres of land freehold, at T., in the parish of D.," parol evidence was admitted to show what particular land was the subject matter of the contract;⁸ and if a party agree to pay rent for a certain farm at a specified sum per acre,⁹ or, in

1834, 5 B. & Ad. 1109; *Raikes v. Todd*, 1838, 8 L. J. Q. B. 35.

¹ *Joint v. Mostyn*, 1823, 2 Fox & Sm. 4; *Saunders v. Cramer*, 1842, 3 Dr. & War. 187 (Ir.); *Price v. Richardson*, 1845, 15 L. J. Ex. 345; *Caballero v. Slater*, 1854, 23 L. J. C. P. 67.

² *Archer v. Baynes*, 1850, 20 L. J. Ex. 54; *Wood v. Midgley*, 1854, 23 L. J. Ch. 553; *Holmes v. Mitchell*, 1859, 48 L. J. C. P. 301.

³ *Carroll v. Cowell*, 1838, 1 Jebb. & Sy. 43 (Ir.); *Morgan v. Sykes* (Ld. Abinger, C.B.), not reported, and undated, cited in *Coats v. Chaplin*, 1842, 11 L. J. Q. B. 315.

⁴ "I admit that an agreement is

not perfect, unless in the body of it, or by necessary inference, it contains the names of the two contracting parties, the subject-matter of the contract, the consideration, and the promise." *Tindal, C.J.*, in *Laythoarp v. Bryant*, 1836, 3 Scott, 238.

⁵ *Marshall v. Berridge*, 1882, 19 Ch. D. 223; *In re Lander and Bagley's Contract*, [1892] 3 Ch. 41.

⁶ *Sarl v. Bordillon*, 1856, 26 L. J. C. P. 78.

⁷ *Shardlow v. Cotterill*, 1881, 20 Ch. D. 90 (C. A.).

⁸ *Plant v. Bourne*, [1897] 2 Ch. 281.

⁹ *Shannon v. Bradstreet*, 1803, 1 Sch. & Lef. 73 (Ir.).

§§ 1024,
1025.

consideration of forbearance, to pay for all goods supplied to a third party during the antecedent month, or even to liquidate his *debt*, the written memorandum need not specify the number of the acres, the quantity of the goods, or the amount of the debt; because each of these facts is capable of being ascertained with certainty by subsequent inquiry.¹ In the last instance given the court will not presume the existence of more debts than one, but will call upon a party impeaching the document for uncertainty to furnish proof of that fact, and, in the absence of such proof, will apply the maxim, *de non apparentibus et de non existentibus eadem est ratio*,² Moreover, the omission of the particular mode³ or time of payment, or even of the price itself, does not necessarily invalidate a contract of sale;⁴ and a written order for goods "on moderate terms" will satisfy the statute,⁵ though, if a specific price be agreed upon, it must be mentioned in the contract.⁶ But where a memorandum of a contract was void for omitting all reference to the price, plaintiff has been allowed to rely on part performance of the contract, and then to establish by parol evidence the price on which the parties had verbally agreed.⁷

§ 1025. The names of both contracting parties must, however, be specified in the memorandum⁸ either nominally, or by description, or by reference. But the courts show little inclination to enforce any strict rule on this point. For instance, in two sales of land by auction, where the particulars stated that the property was put up for sale "by direction of the proprietor," the requirements of the 4th section of the Act were held to be satisfied, so

¹ *Bateman v. Phillips*, 1812, 15 East, 272; *Shortrede v. Cheek*, 1834, 3 L. J. K. B. 125; *Bleakley v. Smith*, 1840, 11 Sim. 150. See post, § 1030.

² *Shelton v. Braithwaite*, 1841, 7 M. & W. 436; *Shortrede v. Cheek*, 1834, 3 L. J. K. B. 125; *Dobell v. Hutchinson*, 1835, 3 A. & E. 371; *Powell v. Dillon*, 1814, 2 Ball & B. 420 (Ir.); *Spickernell v. Hotham*, 1834, 1 Kay. 669.

³ *Sarl v. Bourdillon*, 1856, 26 L. J. C. P. 78.

⁴ *Valpy v. Gibson*, 1847, 16 L. J. C. P. 241.

⁵ *Ashcroft v. Morrin*, 1842, 4 M. & Gr. 450.

⁶ *Elmore v. Kingscote*, 1826, 8 Dowl. & R. 343; *Goodman v. Griffiths*, 1857, 26 L. J. Ex. 415.

⁷ *Jeffcott v. North Brit. Oil Co.*, 1873, 1r. R. 8 C. L. 17.

⁸ *Champion v. Plummer*, 1805, 1 Bos. & P. N. R. 252; *Vandenbergh v. Spooner*, 1866, L. R. 1 Ex. 316; *Williams v. Byrnes*, 1863, 2 N. R. 47; *Warner v. Willington*, 1856, 25 L. J. Ch. 662; *Wheeler v. Collier*, 1827, M. & M. 125; *Skelton v. Cole*, 1857, 4 De G. & J. 587; *Williams v. Lake*, 1859, 29 L. J. Q. B. 1; *Newell v. Radford*, 1867, L. R. 3 C. P. 52; *Boyce v. Green*, 1826, Batty, 608 (Ir.); *Williams v. Jordan*, 1877, 6 Ch. D. 517.

§§ 1025,
1026.

far as the description of the vendor was concerned.¹ The same has been ruled on other occasions, in which a description of the vendor as "the executor of Admiral F.,"² or as "a trustee selling under a trust for sale,"³ or "landlord"⁴ has been held to be under the circumstances sufficient. The description "owner" has also been held to be sufficient:⁵ and so has the word "tenant," where it can reasonably be taken that one of the parties signed as such.⁶ And an agreement for a lease, which did not mention the name of the tenant, but commenced "in consideration of you having this day paid me the sum of 50*l*." was held to sufficiently specify the proposed tenant upon its being proved who in fact paid the 50*l*.⁷ And, under the Sale of Goods Act,⁸ if a defendant purchase various articles in the plaintiff's shop, and sign his name and address to an entry in an "Order-book" which specifies the articles and the prices, the statute is satisfied if plaintiff's name is printed on the fly-leaf of the Order-book, where it may be seen if looked for.⁹

1026.¹⁰ The written evidence rendered necessary by the Statute of Frauds and similar statutes, need not, however, be comprised in a single document, or to be drawn up in any particular form. A draft, if duly signed, will suffice even where a more formal document was intended.¹¹ It will suffice if the contract can be *plainly made out in all its terms from any writings* of the party,¹² or even from his *correspondence*,¹³ provided such writings or corre-

¹ *Rossiter v. Miller*, 1878, 5 Ch. D. 648 (H. L.); *Sale v. Lambert*, 1874, L. R. 18 Eq. 1. See, also, *Commins v. Scott*, 1875, L. R. 20 Eq. 11.

² *Hood v. Ld. Barrington*, 1868, L. R. 6 Eq. 218.

³ *Catling v. King*, 1877, 5 Ch. D. 660 (C. A.).

⁴ *Coombs v. Wilkes*, 1891, 3 Ch. 77. The cases above cited appear to dispose of a case in which it was decided that the mere term "vendor" was not a sufficient description: *Potter v. Duffield*, 1874, L. R. 18 Eq. 4 (Romilly, M.R.). See, also, *Thomas v. Brown*, 1876, 1 Q. B. D. 714.

⁵ *Butcher v. Nash*, 1899, 61 L. T. 72.

⁶ *Stokell v. Niven*, 1889, 61 L. T. 18 (C. A.).

⁷ *Carr v. Lynch*, [1900] 1 Ch. 613 (Farwell, J.).

⁸ § 4 (1) of "The Sale of Goods Act, 1893" (56 & 57 V. c. 71), corresponds with § 17 of the Statute of Frauds.

⁹ *Sarl v. Bourdillon*, 1856, 26 L. J. C. P. 78.

¹⁰ Gr. Ev. § 268, in part.

¹¹ *Gray v. Smith*, 1890, 43 Ch. D. 208 (C. A.). But see *Bristol Aerated Bread Company v. Maggs*, 1890, 44 Ch. D. 616 (C. A.); *Bolton v. Lambert*, 1889, 41 Ch. D. 295.

¹² See *Shardlow v. Cotterill*, 1881, 20 Ch. D. 90 (C. A.).

¹³ *Bellamy v. Debenham*, 1890, 45 Ch. D. 481; *Allen v. Bennet*, 1810, 3 Taunt. 169; *Jackson v. Lowe*, 1822, 1 Bing. 9; *Phillimore v. Barry*, 1808, 1 Camp. 513; *Warner v. Wilington*, 1856, 25 L. J. Ch. 662; *Skelton v. Cole*, 1857, 4 De G. & J.

§ 1026. spondence contain internal evidence connecting them together;¹ and an envelope in which a letter has been enclosed is sufficiently connected with the letter to supply the name of one of the parties to the contract.² A signed letter will even be sufficient which does not contain in itself any one of the terms of the agreement if it distinctly refers to and recognises any writing which does contain them all.³ In such case a well-known maxim, "*verba illata inesse videntur*," will apply.⁴ A written memorandum, however, which in any material point differs from the terms of the verbal contract, or which either introduces any new term, or leaves any material term open to doubt,⁵ will not satisfy the requirements of the statute.⁶ Neither will a letter suffice, which, instead of ratifying, repudiates the written but unsigned contract relied on;⁷ though a letter which enumerates all the essential terms of the bargain will be sufficient, notwithstanding it may also contain some reason for the non-acceptance of the goods, which form the subject-matter of the contract.⁸ A simple acceptance by letter of a written offer to purchase may, indeed, constitute a contract to sell, although it refers to the preparation of a more formal contract; unless such reference be so expressed as to indicate an intention not to be bound by the bargain until the formal instrument be duly executed.⁹ It must, however, be

587; *Oliver v. Hunting*, 1890, 44 Ch. D. 205.

¹ *Secus*, if not connected together. *Taylor v. Smith*, 1892, 61 L. J. Q. B. 231 (C. A.); *Potters v. Peters*, 1895, 64 L. J. Ch. 357.

² *Pearce v. Gardner*, [1897] 1 Q. B. 688.

³ *Doubell v. Hutchinson*, 1835, 3 A. & E. 371; *Jones v. Victoria Graving Dock Co.* 1877, 2 Q. B. D. 314; *Gibson v. Holland*, 1865, L. R. 1 C. P. 1; *Macrory v. Scott*, 1850, 20 L. J. Ex. 90; *Ridgway v. Wharton*, 1856-7, 24 L. J. Ch. 46 (H. L.); *Sug. V. & P.* 137; *Baumann v. James*, 1868, L. R. 3 Ch. 508; *Long v. Millar*, 1878, 4 C. P. D. 450 (C. A.); *Cave v. Hastings*, 1881, 7 Q. B. D. 125; *Crane v. Powell*, 1868, L. R. 4 C. P. 123; *Oliver v. Hunting*, 1890, 44 Ch. D. 205.

⁴ See per Parke, B., in *Llewellyn v. Id. Jersey*, 1843, 12 L. J. Ex. 243.

⁵ In *Hussey v. Horne-Payne*, 1878, 8 Ch. D. 670, the C. A. held that a proposal to sell, accepted "subject to the title being approved," was no sufficient acceptance; but in *H. L.*, 1879, 4 App. Cas. 311, this was questioned (Ld. Cairns).

⁶ *Mahalen v. Dublin & Chap. Distil. Co.*, 1877, Ir. R. 11 C. L. 83.

⁷ *Archer v. Baynes*, 1850, 20 L. J. Ex. 54; *Richards v. Porter*, 1827, 6 B. & C. 437; *Cooper v. Smith*, 1812, 15 East, 103. See *Goodman v. Griffiths*, 1857, 26 L. J. Ex. 415; *Jackson v. Oglander*, 1865, 2 H. & M. 465.

⁸ *Bailey v. Sweeting*, 1861, 30 L. J. C. P. 150; *Wilkinson v. Evans*, 1866, L. R. 1 C. P. 407; *Buxton v. Rust*, 1872, L. R. 7 Ex. 279; *Leather Cloth Co. v. Hieronimus*, 1875, L. R. 10 Q. B. 140; *Munday v. Asprey*, 1880, 13 Ch. D. 855; *Elliott v. Dean*, 1884, C. & E. 283.

⁹ *Bonnewell v. Jenkins*, 1878, 8

possible to collect the entire contract from the *writings*; ¹ verbal testimony not being admissible to supply any defects or omissions in the written evidence.² Parol evidence may, nevertheless, be admitted to show the situation of the parties at the time the contract was made;³ to identify any plans or other documents or things referred to in the contract;⁴ or to explain the language employed,⁵ or, it seems, even to fix the date at which it was committed to writing.⁶

§§ 1026,
1027.

§ 1027. It does not, moreover, signify to whom the memorandum which states the terms of the agreement is addressed, because a memorandum is not necessary to *constitute* the contract, but merely to furnish satisfactory *proof* of it. Therefore, a letter addressed to a third party,⁷ or a recital of the arrangement contained in the will of the party to be charged,⁸ or an answer to a bill in Chancery under the old forms of pleading, or an affidavit in any legal proceeding,⁹ or written and signed instructions given to a telegraph clerk for transmission,¹⁰ or the minutes of a board meeting, signed by the chairman;¹¹ will suffice, provided the documents sufficiently refer to the terms of the original verbal

Ch. D. 70 (C. A.); *Crossley v. Maycock*, 1874, L. R. 18 Eq. 180; *Rossiter v. Miller*, 1878, 3 A. C. 1124 (H. L.); *Brien v. Swainson*, 1877, 1 L. R. Ir. 135; *Lewis v. Brass*, 1878, 3 Q. B. D. 667 (C. A.); *Chipperfield v. Carter*, 1895, 72 L. T. 487 (Wright, J.).

¹ *Chinnock v. Lady Ely*, 1865, 34 L. J. Ch. 399; *Winn v. Bull*, 1877, 7 Ch. D. 29; *Rishton v. Whatmore*, 1878, 8 Ch. D. 467; *Dolling v. Evans*, 1867, 36 L. J. Ch. 474; *Nesham v. Selby*, 1872, L. R. 7 Ch. 406; *Peirce v. Corf*, 1874, L. R. 9 Q. B. 210.

² *Boydell v. Drummoud*, 1809, 11 East, 142; *Cox v. Middleton*, 1855, 23 L. J. Ch. 618; *Ridgway v. Wharton*, 1854, 24 L. J. Ch. 46; *Caddick v. Skidmore*, 1858, 3 Jur. N. S. 1185; *Fitzmaurice v. Bayley*, 1857, 8 E. & B. 664 (Ex. Ch.); *Clarke v. Fuller*, 1864, 16 C. B. N. S. 24; *Parkhurst v. Van Cortlandt*, 1814, 1 Johns. 280; *Abeel v. Radcliffe*, 1816, 13 Johns. 297 (Am.).

³ *Sweet v. Lee*, 1841, 3 M. & Gr. 452.

⁴ *Horsfall v. Hodges*, 1824, 2 Coop.

115; *Cave v. Hastings*, 1881, 7 Q. B. D. 125.

⁵ *Sweet v. Lee*, 1841, 3 M. & Gr. 452. See *Waldron v. Jacob*, 1871, Ir. R. 5 Eq. 131, where parol evidence was admitted to show what "this place" meant.

⁶ *Edmunds v. Downes*, 1834, 3 L. J. Ex. 98; *Hartley v. Wharton*, 1840, 11 A. & E. 934; *Lobb v. Stanley*, 1844, 13 L. J. Q. B. 117.

⁷ *Longfellow v. Williams*, 1804, Peake, Add. C. 225; *Rose v. Cunyng-hame*, 1805, 11 Ves. 550, 12 Ves. 29; *Gibson v. Holland*, 1865, L. R. 1 C. P. 1.

⁸ *In re Hoyle*, *Hoyle v. Hoyle*, 1892, 41 W. R. 81 (C. A.).

⁹ *Barkworth v. Young*, 1857, 26 L. J. Ch. 153.

¹⁰ *Godwin v. Francis*, 1870, L. R. 5 C. P. 121. In America even a telegram sent by *verbal* instructions has been held to be sufficient. *Dunning v. Roberts*, 1862, 35 Barb. (N. Y.) 463 (Am.).

¹¹ *Jones v. Victoria Graving Dock Co.*, 1877, 2 Q. B. D. 314.

§§ 1027—1029. promise; and, indeed, even the attestation by the party to be charged of a deed which recites the oral agreement is sufficient, if it appear that he in fact knew of the recital.¹ A written memorandum, made after the action is brought, will not, however, satisfy the statute.²

§ 1028. The *place of signature* is likewise immaterial when a statute merely requires that a writing should be *signed* by the party, and not that it should be *subscribed*. Therefore, if a party, or his duly authorised agent,³ insert his name, either at the beginning, or in the body, of a document, for the purpose of authenticating or governing every part of it, this will be equally valid with a signature at the foot.⁴ But in these cases it will always be a question for the jury, whether the party, not having signed it regularly at the foot, meant to be bound by a document as it stood, or whether it was left so unsigned because he refused to complete it.⁵ Consequently, where an agreement, drawn up by the secretary of one of the contracting parties, contained the names of both of them in the body of the instrument, but concluded "As witness our hands," and no signatures were subscribed, it was held that the statute was not satisfied, as it was obviously intended that the agreement should not be perfect till the names were added at the foot.⁶

§ 1029. With respect, again, to the *mode of signature*, it matters not whether the *Christian* name be set out at length or denoted by the initial, or omitted altogether.⁷ It seems, however, that the *surname* must be written at length, and that a letter signed by mere initials of the party,⁸ or subscribed, without signature, "by

¹ Welford v. Beezley, 1747, 1 Ves. Sen. 6.

² Bill v. Bament, 1841, 10 L. J. Ex. 302.

³ Evans v. Hoare, [1892] 1 Q. B. 593.

⁴ Caton v. Caton, 1867, L. R. 2 H. L. 127 (H. L.); Lobb v. Stanley, 1844, 13 L. J. Q. B. 117; Johnson v. Dodgson, 1837, 6 L. J. Ex. 185; Darrell v. Evans, 1862, 31 L. J. Ex. 337; Knight v. Crockford, 1794, 1 Esp. 190; Lemayne v. Stanley, 1681, 3 Lev. 1; Ogilvie v. Foljambe, 1817, 3 Mer. 53; Saunderson v. Jackson, 1800, 2 B. & P. 238; Hammersley v.

Baron de Biel, 1845, 12 Cl. & Fin. 45 (H. L.) (Ld. Cottenham); Holmes v. Mackrell, 1858, 3 C. B. N. S. 789; Bleakley v. Smith, 1840, 11 Sim. 150. See post, § 1075.

⁵ Johnson v. Dogson, 1837, 6 L. J. Ex. 185.

⁶ Hubert v. Treherne, 1842, 11 L. J. C. P. 78.

⁷ Lobb v. Stanley, 1844, 13 L. J. Q. B. 117; Ogilvie v. Foljambe, 1817, 3 Mer. 53.

⁸ Hubert v. Moreau, 1826, 2 C. & P. 528; Sweet v. Lee, 1841, 3 M. & Gr. 452.

your affectionate mother,"¹ or the like, will not suffice. A printed signature has, too, been held sufficient where the party to be charged has written other parts of the memorandum, or has done other acts amounting to a recognition of his printed name.² As before pointed out, even a telegram, if sent in the usual way by the party to be charged, and containing his name, would satisfy the Act.³ Again, it is generally unnecessary that the agreement or memorandum should be signed *by both parties*; for in most cases the statute only requires that it should be signed "by the party to be charged therewith," that is, by the defendant, against whom the performance or damages are demanded.⁴ If it be said that, unless the plaintiff also signs, there is a want of mutuality, the answer is, that the defendant had it in his power to require the plaintiff's signature; and that, if he has not done so, it is his own fault.⁵ A written and signed proposal accepted by parol will be sufficient,⁶ provided the offer be accepted in its entirety;⁷ and so will a parol acceptance of one of two alternatives contained in a written and signed offer.⁸

§§ 1029—
1030a.

§ 1030. These general observations apply to most of the Acts that render documentary proof necessary.

§ 1030A. It will now be convenient to notice briefly some of the transactions enumerated in the Statute of Frauds which seem to require explanation.

¹ Selby v. Selby, 1817, 3 Mer. 2.

² Schneider v. Norris, 1814, 2 M. & Selw. 286; Saunderson v. Jackson, 1800, 2 B. & P. 238; Tourret v. Cripps, 1879, 48 L. J. C. H. 567.

³ See supra, § 1027.

⁴ Laythoarp v. Bryant, 1836, 3 Scott, 238; Liverpool Borough Bk. v. Eccles, 1859, 28 L. J. Ex. 122; Seton v. Slade, 1802, 7 Ves. 275 (Ld. Eldon); Egerton v. Mathews, 1805, 6 East, 307; Allen v. Bennet, 1810, 3 Taunt. 169. The last two cases were decisions on § 17 of the Stat. of Frauds (now § 4 of "The Sale of Goods Act, 1893"), which uses the word *parties*. They overrule the dicta of Ld. Redesdale and Sir T. Plumer in Lawrenson v. Butler, 1802, 1 Sch. & Lef. 13 (Ir.); and O'Rourke v. Perceval, 1811, 2 Ball & B. 58 (Ir.). See 3 M. & Gr. 462, n., 1841, and 2 Kent, Com. 510. As to when a

covenantee may sue for a breach of covenant, although he has not executed the deed, see Wetherell v. Langston, 1847, 17 L. J. Ex. 338; Pitman v. Woodbury, 1848, 3 Ex. 4; British Emp. Ass. Co. v. Browne, 1852, 22 L. J. C. P. 49; Morgan v. Pike, 1854, 23 L. J. C. P. 64; Swatman v. Ambler, 1852, 22 L. J. Ex. 81.

⁵ Laythoarp v. Bryant, 1836, 3 Scott, 238 (Tindal, C.J.).

⁶ Cresswell, J., in Ashcroft v. Morrin, 1842, 4 M. & Gr. 450; Watts v. Ainsworth, 1862, 31 L. J. Ex. 448; Smith v. Neale, 1857, 26 L. J. C. P. 143; Peek v. N. Staffords. Rail. Co., 1860, 29 L. J. Q. B. 97; Warner v. Willington, 1856, 25 L. J. Ch. 662; Reuss v. Picksley, 1866, L. R. 1 Ex. 342.

⁷ See Forster v. Rowland, 1861, 30 L. J. Ex. 396.

⁸ Lever v. Koffler, [1901] 1 Ch. 543 (Byrne, J.).

§§ 1030b,
1031.

§ 1030B. First, then, as to *guarantees*.¹ The law as to these was materially altered by the Mercantile Law Amendment Act of 1856.² Prior to the 29th of July, 1856, a guarantee—like other agreements, which the Statute of Frauds requires to be in writing,³—was invalid, unless the consideration for the promise was expressly set forth in the document, or at least could be implied therefrom. Gross injustice was caused by this rule, and accordingly a clause was inserted in the Act just cited,⁴ enacting, that “no special promise to be made by any person after the passing of this Act, to answer for the debt, default, or miscarriage of another person, being in writing, and signed by the party charged therewith, or some other person by him thereunto lawfully authorised, shall be deemed invalid to support an action, suit, or other proceeding to charge the person by whom such promise shall have been made, by reason only that the consideration for such promise does not appear in writing, or by necessary inference from a written document.” This provision is silent as to what the result of the needless insertion in the memorandum of a *past* or other legally insufficient consideration would be. In such a case would the courts admit parol evidence to contradict or vary the terms of the written document, by showing that the real consideration for the promise was other than that stated?⁵ Further, although parol evidence is by the statute admissible to supply the consideration, it cannot be received now, any more than formerly, to *explain* the promise.⁶

§ 1031. The main difficulty in the law as to guarantees is to distinguish between *original* and *collateral* promises; that is, between cases where, though goods are supplied to a third party, credit is given solely to the defendant, and cases where the person for whose use the goods are furnished is primarily liable, and the defendant only undertakes to pay for them in the event of the other party making default.⁷ This is a question of fact

¹ Guarantees must now be in writing under the Scotch law. See 19 & 20 V. c. 60, § 6.

² 19 & 20 V. c. 97.

³ Ante, § 1021.

⁴ § 3 of the Act.

⁵ See post, § 1197, ad fin.

⁶ Holmes v. Mitchell, 1859, 48

L. J. C. P. 301.

⁷ Birkmyr v. Darnell, 1704, Salk. 27; Forth v. Stanton, 1668, 1 Wms. Saunders 211a; Barrett v. Hyndman, 1840, 3 Ir. L. R. 109; Fitzgerald v. Dressler, 1859, 29 L. J. C. P. 113; Mallett v. Bateman, 1865, L. R. 1 C. P. 163. See Orrell

for the jury on which it is not possible to lay down any precise rule of construction. In general, cases of this kind must separately be determined on their own merits; ¹ it being remembered that original promises will be valid, though verbally made, ² while collateral promises must be in writing in order to satisfy the statute. ³ Both in England and America, moreover, agreements by factors to sell upon *del credere* commission, are held not to fall within the fourth section of the Statute of Frauds, or to be required to be in writing. ⁴

§§ 1031,
1032.

§ 1032. Further, as to fall within the Statute of Frauds (§ 4) the promise must be one "to answer for the debt, default, or miscarriage of another," ⁵ the liability of that other must continue notwithstanding the promise, or the defendant will not be allowed to rely on the absence of a written document. ⁶ Therefore a promise by a defendant to pay the debt if a plaintiff will discharge out of custody a debtor taken on a *ca. sa.*, is an original one which need not be in writing; for the moment the debtor is discharged *his* liability is at end; ⁷ where, too, a creditor had issued execution against a debtor, an arrangement, with the assent of all parties, that the debtor should convey his property to a third party, who undertook, in consideration of the creditor relinquishing his execution, to pay the amount of the debt, was held not to be within the statute, since its effect was to discharge the original debtor; ⁸ while a promise by A. to B. to pay him a certain sum if he withdrew his record in an action against C. for assault and battery, is likewise an original one. ⁹

v. Coppock, 1857, 26 L. J. Ch. 269.

¹ 1 Wms. Saund. 211 b; 1 Smith, L. C. 334.

² Unless for the sale of goods for the price of 10*l.* or upwards. See ante, § 1020.

³ See *Lakeman v. Mountstephen*, 1874, L. R. 7 H. L. 17.

⁴ *Couturier v. Hastie*, 1852, 22 L. J. Ex. 97; *Wickham v. Wickham*, 1855, 2 K. & J. 478; *Wolff v. Koppel*, 1843, 5 Hill, N. Y. 458 (Am.).

⁵ As to the meaning of these words, see *Macrory v. Scott*, 1850, 20 L. J. Ex. 90.

⁶ See *Gull v. Lindsay*, 1849, 18 L. J. Ex. 355.

⁷ *Goodman v. Chase*, 1818, 1 B. & Ald. 297; *Butcher v. Steuart*, 1843, 12 L. J. Ex. 391; *Lane v. Burghart*, 1841, 1 Q. B. 933. See *Reader v. Kingham*, 1862, 32 L. J. C. P. 108.

⁸ *Bird v. Gammon*, 1837, 5 Scott 213.

⁹ *Read v. Nash*, 1751, 1 Wils. 305; recognised in *Bird v. Gammon*, 1837; as reported 3 Bing. N. C. 889; but questioned and said to be in effect overruled by *Kirkham v. Marter*, 1819, 2 B. & Ald. 613. See 1 Wms. Saund. (1871 edit.), p. 231.

§ 1033.

§ 1033. On the other hand, a promise which contemplates that the original debtor's liability should be kept falls within the statute. This, for example, was held to be the case where an execution debtor was discharged out of custody upon giving a warrant of attorney to secure the payment of his debt by instalments, and the defendant, knowing of this warrant of attorney, undertook, in consideration of the discharge, to see the debt paid;¹ and where a plaintiff, his attorney, and a defendant agreed (leaving the attorney still at liberty to recover his costs), that in consideration of the discontinuance of the suit, the defendant should pay the attorney the costs due from the plaintiff.² But a promise to answer for the debt of another person, who himself never becomes legally indebted to the promisee, is probably not within the Act, even if, at the time of the making of the promise, both parties intended that a contract of suretyship should be created.³ Moreover, it makes no difference whether the goods were delivered to the third party,⁴ or the debt incurred, or the default committed by him, *before* or *after* the promise by the defendant; but the statute applies only to promises made to the person to whom another *is already* or *is to become* answerable.⁵ A promise to *indemnify* is not within the statute, but is an original contract between the parties, and therefore need not be in writing;⁶ a promise therefore to indemnify another, "if you accept these bills for which my son's firm will become liable," will be good, although made by parol.⁷ A promise, however, to endorse bills for the amount of a debt due from a company, if a creditor will withdraw a writ of execution against the company, and so give time for payment, is not a contract of indemnity but a promise to answer for the debt of another, and therefore within the statute.⁸

¹ *Lane v. Burghart*, 1841, 1 Q. B. 933.

² *Tomlinson v. Gell*, 1837, 6 A. & E. 564.

³ *Mountstephen v. Lakeman*, 1874, L. R. 7 H. L. 17 (Id. Selborne).

⁴ *Matson v. Wharam*, 1787, 3 T. R. 80; *Anderson v. Hayman*, 1789, 1 H. Bl. 120.

⁵ *Notes to Forth v. Stanton*; *Williams' Notes to Saunders* 2nd, 1871, vol. 1, p. 234; *Harburg India*

Rubber Comb Co. v. Martin [1902] 1 K. B. 778 (Vaughan Williams, L.J.).

⁶ *Thomas v. Cook*, 1828, 8 B. & C. 728; *Guild v. Conrad*, 1894, 2 Q. B. 885. And see *Harburg India Rubber Comb Co. v. Martin*, *supra*; *Wildes v. Dudlow*, 1875, L. R. 19 Eq. 198.

⁷ *Guild v. Conrad*, *supra*.

⁸ *Harburg India Rubber Comb Co. v. Martin*, *supra*.

§ 1034. The statute applies to promises to answer for the *tortious* default or miscarriage of another, as well as for his breach of *contract*. Therefore, where A. had killed plaintiff's horse, a third party's verbal promise to pay the damage, in consideration of plaintiff's forbearing to sue A., was held void;¹ it seems, however, to be open to doubt whether the facts in this case amounted to a promise to answer for the default or miscarriage of *another*, and it would probably now be held that it was an original contract between the third party and the plaintiff to indemnify the plaintiff in consideration of his forbearance to sue A., and therefore good although not in writing.²

§ 1034A. Where an entire promise is invalid as to a part for not being in writing, no action can be brought on the remainder which is not within the statute, but the whole promise, being indivisible, will be void.³

§ 1034B. A promise to him to pay the promisee's own debt to a third person need not be in writing, for the Act merely applies to a promise to be answerable for a debt of, or a default in some duty by, some *other* person *towards the promisee*; ⁴ but the fact that the promisor is a shareholder in a company owing the debt, and is personally largely interested in freeing their goods from execution, does not make the company's debt his debt so as to take the case out of the statute if he personally guarantees payment without the requisite signed writing.⁵

§ 1035. The provision in the Statute of Frauds (§ 4), requiring "*agreements made in consideration of marriage*" to be in writing, does not embrace mutual promises to marry; but such promises may be verbally made.⁶ But marriage is not a "part performance" of a contract⁷ within the general rule of

¹ *Kirkham v. Marter*, 1819, 2 B. & Ald. 613.

² See *Guild v. Conrad* and other cases *ci'd* *supra*, n. ⁶.

³ *Lexington v. Clark*, 1690, 2 Ventris, 223; *Chater v. Beckett*, 1797, 7 T. R. 201; *Thomas v. Williams*, 1830, 10 B. & C. 664; *Mechelen v. Wallace*, 1837, 6 L. J. K. B. 217.

⁴ *Eastwood v. Kenyon*, 1840, 9 L. J. Q. B. 409; *Hargreaves v. Parsons*, 1844, 14 L. J. Ex. 250;

Thomas v. Cook, 1828, 8 B. & C. 728; *Reader v. Kingham*, 1862; *Wildes v. Dudlow*, 1875, L. R. 19 Eq. 198.

⁵ *Harburg India Rubber Comb Co. v. Martin*, [1902] 1 K. B. 778.

⁶ B. N. P. 280, c.

⁷ *Hammersley v. Baron de Biel*, 1845, 12 Gl. & Fin. 45 (Ld. Cottonham); *Redding v. Wilks*, 1791, 3 Bro. C. C. 401; *Lassence v. Tierney*, 1849, 1 Mac. & G. 351; *Warden v. Jones*, 1857, 27 L. J. Ch. 190; *Re Eyre*, 1895, 72 L. T. 588 (Romer, J.).

§ 1035. equity that a contract void by statute will be enforced if it be a *complete* agreement,¹ of which there has been such a part performance on the side of the plaintiff that it would be a fraud on him if the defendant could object that the agreement was not in writing.² Therefore, if a suitor verbally agrees to settle property on his intended wife, and the lady marries him, relying on his honour, she cannot compel the performance of his agreement.³ Neither can a suitor, after simply marrying his intended wife, enforce the specific performance of a parol agreement previously made by her father with reference to settlements.⁴ At the same time, in the event of a clear case of fraud being established, the court, notwithstanding the Act, would compel a father to perform verbal promises on the faith of which the marriage was contracted.⁵ If a father were to say to a suitor, "Marry my daughter, and settle so much a year on her for her jointure, in which case I will give you so much for her portion," with a fraudulent intent to deceive him, it is possible that this proposal, though not reduced to writing, if the marriage were actually to take place, and the jointure were settled, would amount to a valid equitable contract to give the portion.⁶ A verbal agreement made before marriage will be enforced, if subsequently to the marriage it has been recognised and adopted in writing;⁷ this, a post-nuptial settlement reciting an

¹ *Lady E. Thynne v. E. of Glen-gall*, 1847-8, 2 H. L. C. 131.

² *Clinan v. Cooke*, 1802, 1 Sch. & Lef. 41 (Ir.); *Kine v. Balfe*, 1813, 2 Ball & B. 347; *Surcome v. Pinniger*, 1853, 22 L. J. Ch. 419; *Taylor v. Beech*, 1749, 1 Ves. Sen. 297; *Ungley v. Ungley*, 1877, 5 Ch. D. 887 (C. A.).

³ *Montacute v. Maxwell*, 1720, 1 P. Wms. 619; *Caton v. Caton*, 1867, L. R. 2 H. L. 127.

⁴ *Dundas v. Dutens*, 1790, 1 Ves. Jun. 199; *Goldcutt v. Townsend*, 1860, 28 Beav. 445.

⁵ *Baron de Biel v. Hammersley*, 1845, 12 Cl. & Fin. 45 (H. L.) (Ld. Brougham).

⁶ *Hammersley v. Baron de Biel*, 1845, 12 Cl. & Fin. 45 (H. L.) (Lds. Cottenham, Campbell, and Lyndhurst); *Williams v. Williams*, 1868, 37 L. J. Ch. 854. See, also, *Maun-*

sell v. White, 1854, 4 H. L. C. 1039; *Bold v. Hutchinson*, 1855, 24 L. J. Ch. 285; *Jameson v. Stein*, 1855, 25 L. J. Ch. 41. See *Kay v. Crook*, 1857, 3 Sm. & G. 407. But there must at all events be actual fraud. *Johnstone v. Mappin*, 1891, 60 L. J. Ch. 241.

⁷ *Barkworth v. Young*, 1857, 26 L. J. Ch. 153; *Hammersley v. Baron de Biel*, 1845, 12 Cl. & Fin. 45 (H. L.) (Ld. Cottenham, citing *Hodgson v. Hutchenson*, 1712), 5 Vin. Abr. 522; *Taylor v. Beech*, 1749, 1 Ves. Sen. 297; and *Montacute v. Maxwell*, 1732-3, 1 P. Wms. 619; and questioning *Randall v. Morgan*, 1805, 12 Ves. 67, where Sir W. Grant expressed serious doubt. See *Hammersley v. Baron de Biel*, 1845, as reported 12 Cl. & Fin. 86 (Ld. Brougham); and *De Biel v. Thomson*, 1844, as reported 3 Beav.

ante-nuptial verbal agreement, which has in fact been made, will constitute a sufficient memorandum in writing of the ante-nuptial agreement to satisfy the statute and enable the contract to be enforced against the settlor or his trustee in bankruptcy.¹ The court, however, will not interfere, even in cases where there has been a written memorandum of the promise, unless it appears that the marriage was contracted expressly on the faith of the agreement.² Therefore, a letter by a father to his daughter, saying that he had agreed with her intended husband to give her 3,000*l.* as her portion, which letter was never shown to the husband before the marriage, was held not to be sufficient, since the husband could not have married on the faith of the letter.³

§§ 1035,
1036.

§ 1036. The provision in the Statute of Frauds which renders void any agreement that is "*not to be performed within a year*" from the making thereof, which is not evidenced by writing does not apply where the contract is *capable* of being wholly performed on the one side or on the other within a year.⁴ Neither does it extend to an agreement by a contractor to allow a stranger to share in the profits of a contract incapable of being completed within a year, since such an agreement amounts to nothing more than the vendition of a right which is performed *instantly* on the bargain being struck.⁵ It would also seem to be inapplicable in any case where the action is brought upon an *executed* consideration;⁶ since the object of the statute clearly being only to prevent the setting up, by fraud and perjury, of contracts or promises by parol, upon which parties might otherwise have been charged for their whole lives, its operation must be limited to such actions as are brought to recover damages for the *non-performance* of contracts, which are not intended to be completely performed on either side within a year from the time

475, 476 (Ld. Langdale). Also *Caton v. Caton*, 1867, L. R. 1 Ch. 137 (C. A.).

¹ *Re Holland*, [1902] 2 Ch. 360 (C. A.), disapproving the dicta of Ld. Cranworth, C. in *Warden v. Jones*, 1857, 2 De G. & J. 76, and Jessel, M.R. in *Trowell v. Shenton*, 1878, 8 Ch. D. 318.

² See *Viret v. Viret*, 1880, 50 L. J. Ch. 69 (Malins, V.-C.).

³ *Ayliffe v. Tracy*, 1722, 2 P. Wms.

65. See *Dashwood v. Jermyn*, 1879, 12 Ch. D. 776.

⁴ *Cherry v. Heming*, 1849, 19 L. J. Ex. 63; and *Smith v. Neale*, 1857, 26 L. J. C. P. 143; both recognising *Donellan v. Read*, 1832, 3 B. & Ad. 905.

⁵ *M'Kay v. Rutherford*, 1848, 6 Moo. P. C. C. 413.

⁶ *Knowlman v. Bluett*, 1874, L. R. 9 Ex. 1. See ante, §§ 974, 981—984; post, § 1043.

**§§ 1036,
1037.**

of their being made.¹ Subject to this limitation, a *part-performance* is not sufficient to take the case out of the statute. Whenever it appears, either by express stipulation, or by inference from the circumstances, to have been contemplated that a contract could not be *completed* on either side within the year, documentary proof of such contract must be given.² Thus, a servant verbally hired for a year's service, *commencing at a future day*, cannot maintain an action against the master for discharging him before the expiration of the year, though he has faithfully performed his duty as such servant up to the date of his discharge.³ But though no action can be brought on it, the parol agreement will not be void for all purposes; for the servant may, by a sufficient service under it, acquire a poor law settlement.⁴

§ 1037. A contract which expressly contemplates a duration of more than a year will not be taken out of the operation of the statute by the mere fact that it *may* be determined by the parties within the year.⁵ Therefore, a contract to employ a solicitor during his professional life is within the statute, though it may be determined in less time than a year by the lawyer's death, or retirement, or misconduct.⁶ And in such a case, it matters not whether it were made in this or in any other country; for, as the Act does not bar the right as well as the

¹ *Souch v. Strawbridge*, 1846, 15 L. J. C. P. 170. See *Re Pentre-guinea Coal Co.*, 1862, 31 L. J. Ch. 741.

² *Boydell v. Drummond*, 1809, 11 East, 142.

³ *Bracegirdle v. Heald*, 1818, 1 B. & Ald. 722; *Snelling v. Huntingfield*, 1834, 4 L. J. Ex. 232; *Britain v. Rossiter*, 1879, 11 Q. B. D. 123 (C. A.); *Giraud v. Richmond*, 1846, 15 L. J. C. P. 180. See *Cawthorne v. Cordrey*, 1863, 32 L. J. C. P. 152; *Banks v. Crossland*, 1874, L. R. 10 Q. B. 97. A contract to serve for one year, the service to commence on the day *next* after that on which the contract is made, has been held not to be a contract which is not to be performed within a year: see *Smith v. Gold Coast and Ashanti Explorers, Ltd.*, [1903] 1 K. B.

285, 538.

⁴ *Bracegirdle v. Heald*, 1818, 1 B. & Ald. 722 (Bayley, J.).

⁵ *Birch v. Id.* Liverpool, 1829, 9 B. & C. 392; *Roberts v. Tucker*, 1849, 3 Ex. 632; *Dohson v. Collis*, 1856, 25 L. J. Ex. 267; *Re Pentre-guinea Coal Co.*, 1862, 31 L. J. Ch. 741.

⁶ *Eley v. The Positive, &c. Co.*, 1875, 1 Ex. D. 20. For the rule of law here is the same as in the case of a defeasible estate, where, if a party enters, he is *in* of the whole estate, though an event may afterwards occur, which would prevent the estate from continuing during the entire term contemplated in the original grant. (*R. v. Herstmonceaux*, 1827, 7 B. & C. 555. See *ante*, §§ 1006—1008.)

remedy, or in other words, does not render the agreement void, but only prevents its being enforced by action here, it applies to all foreign contracts equally with those entered into in England.¹ But where an agreement is altogether silent as to the time within which it is to be performed, and its duration rests upon a contingency, which may or may not happen within the year, as, for instance, if it depends on the death or marriage of a party, the length of a voyage, the giving of a notice, or the like, it is not within the operation of the statute, though the event, which is to terminate the agreement, does not in fact occur within the year.²

§§ 1037,
1038.

§ 1038. The expression *interest in lands*, used in § 4 of the Statute of Frauds, has given rise to much litigation. It appears to extend to contracts to abate a tenant's rent;³ to submit to arbitration the question whether a lease shall be granted;⁴ to relinquish a tenancy, and let another party into possession for the residue of a term;⁵ to permit the profits of a clergyman's living to be received by a trustee;⁶ to repay a loan out of the future rent of a farm;⁷ to become a partner in a colliery, which was to be demised by the partnership upon royalties;⁸ to assign a share in partnership assets which include an interest in land;⁹ to take furnished lodgings;¹⁰ or to exercise sporting rights over land, and carry off a portion of the game killed;¹¹ to convey an equity of

¹ *Leroux v. Brown*, 1852, 22 L. J. C. P. 1. But see *Williams v. Wheeler*, 1860, 8 C. B. N. S. 316.

² *Souch v. Strawbridge*, 1846, 15 L. J. C. P. 170; *Knowlman v. Blunett*, 1874, L. R. 9 Ex. 1; *Ridley v. Ridley*, 1865, 34 L. J. Ch. 462; *Wells v. Horton*, 1826, 4 Bing. 40; *Gilbert v. Sykes*, 1812, 16 East, 154; *Peter v. Compton*, 1693, Skin. 353; *Fenton v. Emblers*, 1762, 1 W. Bl. 353. See *Mavor v. Payne*, 1825, 3 Bing. 285; *Murphy v. Sullivan*, 1866, 11 Ir. Jur. (N.S.) 111; *Farrington v. Donohue*, 1866, Ir. R. 1 C. L. 675; *Davey v. Shannon*, 1879, 4 Ex. D. 81.

³ *O'Connor v. Spaight*, 1804, 1 Sch. & Lef. 306.

⁴ *Walters v. Morgan*, 1792, 2 Cox, Ch. 369.

⁵ *Buttemere v. Hayes*, 1839, 9 L. J. Ex. 44; *Smith v. Tombs*, 1839,

3 Jur. 72; *Cocking v. Ward*, 1845, 15 L. J. C. P. 245; *Kelly v. Webster*, 1852, 21 L. J. C. P. 163; *Smart v. Harding*, 1855, 24 L. J. C. P. 76; *Hodgson v. Johnson*, 1859, 28 L. J. Q. B. 88; *Ronayne v. Sherrard*, 1877, Ir. R. 11 C. L. 146.

⁶ *Alchin v. Hopkins*, 1834, 1 Bing. N. C. 99.

⁷ *Ex p. Hall. Re Whitting*, 1878, 10 Ch. D. 615 (C. A.).

⁸ *Caddick v. Skidmore*, 1857, 3 Jur. N. S. 1185.

⁹ *Gray v. Smith*, 1890, 43 Ch. D. 208 (C. A.).

¹⁰ *Edge v. Stafford*, 1831, 1 C. & J. 391; *Inman v. Stamp*, 1815, 1 Stark. 12; *Mechelen v. Wallace*, 1837, 6 L. J. K. B. 217; *Vaughan v. Hancock*, 1846, 16 L. J. C. P. 1.

¹¹ *Webber v. Lee*, 1882, 9 Q. B. D. 315 (C. A.).

**§§ 1038,
1039.**

redemption;¹ or to procure, as a broker, the sale of a lease.² On the other hand, it appears the words "interest in land" do not extend to an equitable mortgage by deposit of title-deeds;³ a collateral agreement by a lessee to pay a percentage on money laid out by the landlord on the premises;⁴ a contract relating to the investigation of a title to land;⁵ an agreement for board and lodging, no particular rooms being demised;⁶ an agreement between a landlord and tenant, that the former shall take at a valuation certain fixtures left by the latter in the house;⁷ an undertaking by a landlord to build a water-closet for his tenant;⁸ or to put the house in repair and put more furniture into it;⁹ an agreement for the use of a graving dock during the repairs of a ship;¹⁰ or a contract that an arbitrator shall determine the amount of damages sustained by a party, in consequence of a road having been made through his lands.¹¹ How far the words in question make the Act apply to profits à prendre, easements, and other incorporeal rights relating to lands, is by no means clear; though they ought, on principle, to extend to all agreements respecting rights of common, rights of way, grants of rent-charges, tolls, or licences coupled with an interest, however trifling, in lands.¹²

§ 1039. The question, whether *shares* in a joint-stock company,¹³ possessed of *real estate*, were an interest in lands, was formerly much discussed.¹⁴ But it is now enacted that all shares issued

¹ *Massey v. Johnson*, 1847, 17 L. J. Ex. 182 (Rolfe, B.). See *Toppin v. Lomas*, 1855, 24 L. J. C. P. 144.

² *Horsley v. Graham*, 1869, L. R. 5 C. P. 9.

³ *Russel v. Russel*, 1783, 1 Bro. C. C. 269.

⁴ *Hoby v. Roebuck*, 1816, 7 Taunt. 157.

⁵ *Jeakes v. White*, 1851, 21 L. J. Ex. 245.

⁶ *Wright v. Stavert*, 1850, 29 L. J. Q. B. 161.

⁷ *Hallen v. Runder*, 1834, 3 L. J. Ex. 260; *Lee v. Gaskell*, 1876, 1 Q. B. D. 700.

⁸ *Mann v. Nunn*, 1874, 43 L. J. C. P. 241.

⁹ *Angell v. Duke*, 1875, L. R. 10 Q. B. 174.

¹⁰ *Wells v. Kingston-upon-Hull*, 1875, L. R. 10 C. P. 402.

¹¹ *Gillanders v. Ld. Rossmore*, 1835, Jones, Ex. 504; *Griffiths v. Jenkins*, 1864, 3 New R. 489.

¹² *Cook v. Stearns*, 1814, 11 Mass. 533 (Am.); *R. v. Salisbury*, 1838, 7 L. J. M. C. 110.

¹³ As to shares in an ordinary private partnership owning real estate, see *Ashworth v. Munn*, 1878, 15 Ch. D. 363 (C. A.).

¹⁴ *Bligh v. Brent*, 1836-7, 6 L. J. Ex. Eq. 58; *Bradley v. Holdsworth*, 1838, 7 L. J. Ex. 153; *Hibblewhite v. M'Morine*, 1840, 9 L. J. Ex. 217; *Humble v. Mitchell*, 1839, 11 A. & E. 205; *Baxter v. Brown*, 1845, 7 M. & Gr. 215; *Hilton v. Giraud*, 1847, 16 L. J. Ch. 285; *Watson v. Spratley*, 1854, 24 L. J. Ex. 53; *Bulmer v. Norris*, 1860, 30 L. J. C. P. 25. See *Edwards v. Hall*, 1855, 25 L. J. Ch. 82; *overruling Ware v. Cumberlege*, 1855, 24 L. J.

§ 1039.

either under the old Joint-Stock Companies Act of 1856, or under the present Companies Acts, "shall be personal estate, and shall not be of the nature of real estate."¹ In many cases, too, where a company has been incorporated by statute, Parliament has expressly declared that the shares shall be deemed personal estate.² Even in the absence of any such declaration, if a company be *incorporated* by statute or by charter, and real property be vested in it, of which it is to have the sole management, the shares of the individual proprietors will be personalty, and will consist of nothing more than a right to participate in the net produce of the property of the company. The same doctrine will apply, even where the company is *unincorporated*,—as, for instance, if it be a mining co-partnership conducted on the cost-book principle,—provided that the real estate be vested in trustees in trust to use it for the benefit of the shareholders, and to make profits out of it, as part of the stock in trade; and provided that the interest of the shareholders be confined to those profits.³ If, however, the trustees hold the real estate in trust for themselves and the co-adventurers, present and future, in proportion to their number of shares, then there will be a direct interest in the realty; and, consequently, neither a bargain for, nor a transfer of, a share in such interest can be made without a note in writing.⁴ Where the real property is held upon trusts, the question—under which of these two species of trusts above indicated it is held—is in general one merely of fact, to be determined in each case by the jury.⁵ But if the freehold which forms the basis and subject-

Ch. 630; and see, also, *Powell v. Jessopp*, 1856, 25 L. J. C. P. 199; and *Taylor v. Linley*, 1860, 29 L. J. Ch. 534.

¹ 19 & 20 V. c. 47, § 15; 25 & 26 V. c. 89, § 22.

² As, for instance, in the case of all companies subject to the provisions of "The Cos. Clauses Consolid. Act, 1845" (8 & 9 V. c. 16), § 7; in the case of the Lancaster Canal Co., Mon. & B. 94; of the Lond. & Birmingham Rail. Co. (see *Bradley v. Holdsworth*, 1838, 7 L. J. Ex. 153); and of many others. Again, stock, to which "The Colonial Stock Act, 1877," applies,

is personal estate (40 & 41 V. c. 59 § 22).

³ *Watson v. Spratley*, 1854, 24 L. J. Ex. 53. See *Myers v. Perigal*, 1851-2, 21 L. J. C. P. 217; *Walker v. Bartlett*, 1856, 25 L. J. C. P. 263; *Hayter v. Tucker*, 1857, 4 K. & J. 243; *Bennett v. Blain*, 1863, 33 L. J. C. P. 63; *Freeman v. Gainsford*, 1865, 34 L. J. C. P. 95; *Entwistle v. Davis*, 1867, L. R. 4 Eq. 272.

⁴ *Id.*; *Baxter v. Brown*, 1845, 7 M. & Gr. 215; *Boyce v. Green*, 1826, Batty, 608 (Ir.). See *Morris v. Glynn*, 1859, 27 Beav. 218.

⁵ *Watson v. Spratley*, 1854, 24 L. J. Ex. 53.

§§ 1039—1041. matter of the trade of an unincorporated company, be vested in the collective body, the shares of the individual co-partners seem clearly to then fall as matter of law within the meaning of the 4th section of the Statute of Frauds.¹

§§ 1039 A—1040. It is now settled, too, that neither railway debenture stock created under the provisions of the Companies Clauses Act, 1863,² nor railway debentures, are an interest in lands.³

§ 1041.⁴ Returning to the consideration of what is an "interest in lands" within the statute, it may be noted that the principal difficulties in interpreting what is meant by an "interest in lands," arise in cases where trees, *growing crops*, building materials, or other things annexed to the freehold, form the subject of the contract. Lord Abinger said, as to these cases, that "no general rule is laid down in any of them, that is not contradicted by some other,"⁵ and to this day the judges have not agreed upon any uniform test for the determination of this question.⁶ In some cases they have endeavoured to solve it by reference to the law of emblements; holding that whatever will go to the executor, the tenant being dead, cannot be considered as an interest in land.⁷ In other cases they have

¹ See, further, as to the transfer of shares in joint stock companies, ante, § 993.

² 26 & 27 V. c. 118, § 22.

³ *Attree v. Hawe*, 1878, 9 Ch. D. 337 (C. A.); *Holdsworth v. Davenport*, 1876, 3 Ch. D. 185; *Walker v. Milne*, 1849, 18 L. J. Ch. 288. These cases overrule *Ashton v. Ld. Langdale*, 1851, 4 De G. & Sm. 402, n.; and *Chandler v. Howell*, 1877, 4 Ch. D. 651. In connection with this subject it may be convenient to mention that while, as stated above, debentures are not within § 4 of the Statute of Frauds, *scrip* and *shares* in joint-stock companies, whether incorporated or unincorporated, are not "*goods, wares and merchandises*" within § 17 of the same statute (now replaced, as already mentioned in § 1020, by § 4, subs. 1, of "The Sale of Goods Act, 1893"). (*Humble v. Mitchell*, 1839, 11 A. & E. 205; *Hibblewhite v. M'Morine*, 1840, 9 L. J. Ex. 217; *Knight v. Barber*, 1846, 16 L. J. Ex. 18; *Tempest v. Kilner*, 1846, 15 L. J. C. P. 101;

Bowlby v. Ball, 1846, 3 C. B. 284; *Duncuft v. Albrecht*, 1841, 12 Sim. 189; *Watson v. Spratley*, 1854, 24 L. J. Ex. 53.) As the judgment determining this proceeds on the ground that such shares are mere choses in action (but in *re Jackson*, Ex parte Bk. of Manchester, 1871, L. R. 12 Eq. 354, *Bacon v. V.-C.*, held that shares in a company were not "things in action" within the meaning of 32 & 33 V. c. 71, § 15, subs. 5 (now re-enacted by 46 & 47 V. c. 52, § 44, subs. 3)), it also inferentially determines (*Heseltine v. Siggers*, 1848, 18 L. J. Ex. 166), that contracts for the sale of stock or exchequer bills are not within the Act. (*Pickering v. Appleby*, 1720-1, Com. R. 354, cited in *Colt v. Netttervill*, 1725, 2 P. Wms. 308 (Ld. Ch. King)).

⁴ Gr. Ev. § 271, in part as to first four lines.

⁵ *Rodwell v. Phillips*, 1842, 11 L. J. Ex. 217.

⁶ See Sug. V. & P. 124—8.

⁷ *Rodwell v. Phillips*, 1842, 11

considered the test to be, whether the property in dispute could have been seized in execution at common law.¹ In others, again, they have drawn a distinction between *fructus industriales*, and the natural products of the soil.² In not a few, too, of the cases, they have rested their decisions partly on the legal character of the principal subject-matter of the contract, but principally on the consideration whether, in order to effectuate *the intention* of the parties, it were necessary to give the vendee an interest in the land.³

§§ 1041,
1042.

§ 1042. From this confusion of decisions it is thought, however, that two broad principles may now be extracted. The first of these broad principles may be deduced from a decision of the Common Pleas Division⁴ in 1876, and appears to be that a sale of *growing things* which are upon land is only within the statute as conferring an interest in land when it is part of the bargain that the things sold are to remain on the land till maturity, or for any other stipulated time, or when it is collateral to a transfer of the land itself; but that such a sale does not confer an interest in land, and is consequently not within the statute when growing things are sold as chattels and are to be removed from the land forthwith after the sale. Endeavouring to view all the cases as to sales of growing crops by the light of this principle, it is submitted, with some diffidence, that a fair summary of the results of these decisions is as follows:—First, a contract for the purchase of *fruits of the earth, ripe*, though not yet gathered, is not a contract for any interest in lands, though the vendee is to enter and gather them.⁵ Secondly, a sale of any growing crops which would be emblements—that is to say, are growing crops which are *reared by labour and expense*, and usually repay within the year in which it is bestowed the labour by which they are produced, as, for instance, crops

L. J. Ex. 217; *Jones v. Flint*, 1839, 9 L. J. Q. B. 252.

¹ *Dunne v. Ferguson*, 1832, *Hayes*, 343 (Ir.); *Rodwell v. Phillips*, 1842, 11 L. J. Ex. 217; *Jones v. Flint*, 1839, 9 L. J. Q. B. 252.

² *Jones v. Flint*, 1839, 9 L. J. Q. B. 252; *Evans v. Roberts*, 1826, 5 B. & C. 832; *Rodwell v. Phillips*, 1842, 9

M. & W. 503 (Ld. Abinger).

³ *Jones v. Flint*, 1839, 9 L. J. Q. B. 252.

⁴ *Marshall v. Green*, 1875, 1 C. P. D. 35.

⁵ *Parker v. Staniland*, 1809, 11 East, 362; *Cutler v. Pope*, 1836, 1 Shepl. 337 (Am.).

§ 1042. of corn,¹ hops,² potatoes,³ or turnips,⁴—is not within the statute, though the purchaser is to harvest or dig them. Similarly, a contract for the sale of other growing things (for example, trees) *as chattels*, when the subject of the sale is ready to be cut and gathered at once, and the contract stipulates that they shall be removed immediately, and does not confer the possession or use of the land for any given time, either in order that it may contribute to the growth of the thing sold till its maturity, or for any other given purpose, is not a contract for an interest in land within the statute.⁵ This principle may possibly also afford a solution of the question which was once raised⁶ as to contracts respecting the sale of teasles, liquorice, madder, clover, or other crops of a like nature, which do not ordinarily repay the labour by which they are produced *within the year* in which that labour is bestowed, and consequently, as it seems, do not fall within the law of emblements, and show that such contracts do not *necessarily* fall within the statute, and only do so where they necessitate as a consequence the enjoyment of land for some given time. Thirdly, an agreement respecting the sale of growing crops, *when fit to be cut and taken*, such as growing fruit,⁷ grass,⁸ underwood,⁹ poles,¹⁰ or timber, which either necessitates the use of the land for the purpose of supporting the crops till they reach maturity, or for any other purpose, is a contract touching an interest in land, which, as such, falls within the fourth section of the Statute of Frauds, and, consequently must be in writing.¹¹ Fourthly,

¹ Jones v. Flint, 1839, 9 L. J. Q. B. 252.

² Parke, B., in Rodwell v. Phillips, 1842, 11 L. J. Ex. 217, questioning Waddington v. Bristow, 1801, 2 B. & P. 452. See, also, Graves v. Weld, 1833, 5 B. & Ad. 105.

³ Sainsbury v. Matthews, 1838, 8 L. J. Ex. 1; Evans v. Roberts, 1826, 5 B. & C. 829; Warwick v. Bruce, 1813, 2 M. & Selw. 205.

⁴ Dunne v. Ferguson, 1832, Hayes, 343 (Ir.). Emerson v. Heelis, 1809, 2 Taunt. 38, *contra*, must be considered as overruled by Evans v. Roberts, 1826, 5 B. & C. 829, and by Jones v. Flint, 1839, 9 L. J. Q. B. 252.

⁵ Marshall v. Green, 1875, 1 C. P. D. 35 (C. A.); Smith v. Surman, 1829, 9 B. & C. 561; explained by Id.

Abinger in Rodwell v. Phillips, 1842, 11 L. J. Ex. 217.

⁶ Graves v. Weld, 1833, 5 B. & Ad. 105, 1 Sug. V. & P. 156 (10th edit.).

⁷ Rodwell v. Phillips, 1842, 11 L. J. Ex. 217, resolving a doubt suggested by Littledale, J., in Graves v. Weld, 1833, 5 B. & Ad. 105.

⁸ Crosby v. Wadsworth, 1805, 6 East, 602; Carrington v. Roots, 1837, 2 M. & W. 248.

⁹ Scorell v. Boxall, 1827, 1 Y. & J. 396.

¹⁰ Teal v. Auty, 1820, 2 B. & B. 99.

¹¹ In two cases, indeed, where an agreement to sell growing timber was held not to convey any interest in the land, in one of them the timber was to be felled and taken

when a contract is made for the sale or letting of land, and the vendee or tenant at the same time contracts to purchase the growing crops on it, this last contract, even though the crops taken under it form the subject of a distinct valuation, is so incorporated with the agreement relating to the land as to be inseparable from it, and to consequently fall within the fourth section of the Act.¹ The second broad principle appears to be that the sale of an *inanimate object* which at the time of such sale forms part of an hereditament, even though the subject of the sale be treated by the contract as a chattel, is within § 4 of the Statute of Frauds—*e.g.*, a sale, as building materials, of a house to be taken down by the purchaser.²

§ 1043. Where a sale of growing crops does not amount to a sale of an interest in land, it may, however, be a transaction which falls within the provisions³ which require a sale of goods to be in writing. This being so, it perhaps, at first sight, seems unimportant to raise any question upon the subject. But two material distinctions exist between the fourth section of the Statute of Frauds—which still governs sales of an interest in land—and the provisions now in force as to sales of goods. Contracts under the former must be stamped, while those under the latter are exempt.⁴ Further, no writing is required by the provisions governing sales of goods, if the subject-matter of the contract is under the value of 10*l.*, or if there has been something given in earnest to bind the contract, or in part-payment, or a part-acceptance, by the purchaser.⁵ To constitute a part-payment, part of the purchase consideration must have actually passed at the time of the contract, it is not sufficient for the parties to verbally agree that a sum of money owing from the purchaser should be retained by the vendor on account of the price

away “as soon as possible” by the purchaser: *Marshall v. Green*, 1875, 1 C. P. D. 35; and in the other the vendor had contracted to sell the timber at so much per foot, and the court regarded that contract in the same light as if it had related to the sale of timber already felled: *Smith v. Surman*, 1829, 9 B. & C. 561; explained by *Ld. Abinger in Rodwell v. Phillips*, 1842, 11 L. J. Ex. 217.

¹ *Ld. Falmouth v. Thomas*, 1832, 1 C. M. & R. 89; *Mayfield v. Wadsley*, 1824, 3 B. & C. 366.

² *Laverly v. Pursell*, 1888, 39 Ch. D. 508.

³ *Viz.*, “The Sale of Goods Act, 1893,” § 4, superseding § 17 of the Statute of Frauds. See ante, § 1020.

⁴ 54 & 55 V. c. 39 (“The Stamp Act, 1891”), Sch. I. tit. Agreement.

⁵ Ante, § 1020.

**§§ 1043,
1044.**

of the goods contracted to be sold.¹ Parol agreements touching lands will, moreover, not be enforced, unless they have been unequivocally performed in some *material* part; as, for instance, possession has been distinctly taken under them and rent paid, or the like;² and such agreements will fall within the operation of the statute, where it would not amount to a fraud upon the acting party if the contract were not completed.³

§ 1044. A contract, which is substantially one for work and labour,⁴ or an agreement to procure goods for another, and to convey them to a certain place,⁵ is not subject to the provisions,⁶ governing sales of goods. Neither is a contract as to fixtures governed by the above provisions or by those of sect. 4⁷ of the Statute of Frauds, for fixtures, though chattels, are not goods, wares, or merchandise.⁸ But where the principal subject-matter of a contract is the sale of goods of the price or value of 10*l.* or upwards, such contract falls within the Sale of Goods Act, 1893,⁶ though it includes other matters,—as, for instance, the agistment of cattle,—to which the Act does not apply.⁹ Moreover, if a person purchase several articles at one time, though at distinct prices, such transaction is regarded as one entire contract; and if the total purchase-money amounts to 10*l.*, it will be within the statute, though none of the articles taken separately may be of that value.¹⁰

¹ Norton *v.* Davison, [1899] 1 Q. B. 401 (C. A.); Walker *v.* Nussey, 1847, 16 M. & W. 302.

² Maddison *v.* Alderson, 1883, 8 A. C. 473 (H. L.), deserves attentive perusal; Lanyon *v.* Martin, 1884, 13 L. R. Ir. 297. See, also, Miller *v.* Aldworth, Lim. *v.* Sharp, 1899, 1 Ch. 622; Hodson *v.* Heuland, 1896, 2 Ch. 428; Humphreys *v.* Green, 1882, 10 Q. B. D. 148 (C. A.); Dale *v.* Hamilton, 1846, 16 L. J. Ch. 126; Lincoln *v.* Wright, 1859, 28 L. J. Ch. 705; Nunn *v.* Fabian, 1865, 35 L. J. Ch. 140 (Ld. Cranworth, C.); Howe *v.* Hall, 1870, Ir. R. 4 Eq. 242; Williams *v.* Evans, 1875, L. R. 19 Eq. 547, and as to which qu.

³ Maddison *v.* Alderson, 1883, 8 App. Cas. 473; Clinan *v.* Cooke, 1802, 1 Sch. & Lef. 41 (Ir.) (Ld. Redesdale). See Haigh *v.* Kaye, 1872, L. R. 7 Ch. 469; Pulbrook *v.*

Lawes, 1876, 1 Q. B. D. 284.

⁴ Clay *v.* Yates, 1856, 25 L. J. Ex. 237. But a contract to make a set of teeth to fit the employer is not a contract for work and labour, so as to dispense with the statute; Lee *v.* Griffin, 1861, 30 L. J. Q. B. 252; nor is an agreement by an artist to paint a picture such a contract: Isaac *v.* Hardy, 1884, 1 Cab. & E. 287 (Mathew, J.).

⁵ Cobbold *v.* Caston, 1824, 1 Bing. 399.

⁶ "The Sale of Goods Act, 1893" (56 & 57 V. c. 71), § 4, superseding § 17 of the Statute of Frauds. See ante, § 1020.

⁷ Ante, § 1038.

⁸ Horsfall *v.* Hey, 1848, 17 L. J. Ex. 266.

⁹ Harman *v.* Reeve, 1856, 25 L. J. C. P. 257.

¹⁰ Baldey *v.* Parker, 1823, 2 B. &

§ 1045.

§ 1045. The *acceptance* and *actual receipt* mentioned by the provisions in force as to the sale of goods,¹ have given rise to much litigation. Without entering into any lengthened discussion, it may be observed that each of these two terms has a distinct and separate meaning;² that a compliance with both requisites is necessary to satisfy the statute;³ that an acceptance and receipt of *part* of the goods will be as operative as an acceptance and receipt of the whole;⁴ that in cases relating to the purchase of *specific* goods the acceptance may precede the receipt as well as follow it or be contemporaneous with it;⁵ that an agent authorised to receive goods is not consequently authorised to accept them;⁶ that the receipt, which itself implies delivery,⁷ must be such as will preclude the vendor from retaining any lien on the goods,⁸ and that the acceptance and receipt together must be such as will preclude the purchaser from objecting to their quantity or quality.⁹ The broad question in such cases,—which must be submitted as one of fact to the jury,¹⁰—is whether the circumstances prove a delivery by the vendor, and an acceptance and actual receipt by the vendee, intended by *both*

C. 37. See, also, *Elliott v. Thomas*, 1838, 7 L. J. Ex. 129; *Bigg v. Whisking*, 1853, 14 C. B. 195.

¹ "The Sale of Goods Act, 1893" (56 & 57 V. c. 71), § 4, superseding § 17 of the Statute of Frauds. See ante, § 1020.

² *Cusack v. Robinson*, 1861, 30 L. J. Q. B. 261.

³ *Id.*

⁴ *Morton v. Tibbett*, 1850, 19 L. J. Q. B. 382 (Ld. Campbell); *Kershaw v. Ogden*, 1865, 34 L. J. Ex. 159.

⁵ *Cusack v. Robinson*, 1861, 30 L. J. Q. B. 261, resolving a doubt expressed in *Saunders v. Topp*, 1849, 18 L. J. Ex. 374, and adopting in part a dictum of Ld. Campbell's in *Morton v. Tibbett*, 1850, 19 L. J. Q. B. 382.

⁶ *Nicholson v. Bower*, 1858, 28 L. J. Q. B. 97; *Hansom v. Armitage*, 1822, 5 B. & Ald. 559; *Norman v. Phillips*, 1845, 14 L. J. Ex. 306.

⁷ *Saunders v. Topp*, 1849, 18 L. J. Ex. 374.

⁸ *Balday v. Parker*, 1823, 2 B. & C. 37; *Maberley v. Sheppard*, 1833,

2 L. J. C. P. 181; *Smith v. Surman*, 1829, 9 B. & C. 561; *Tempest v. Fitzgerald*, 1820, 3 B. & Ald. 680; *Carter v. Toussaint*, 1822, 5 B. & Ald. 855; *Holmes v. Hoskins*, 1854, 9 Ex. 753; *Cusack v. Robinson*, 1861, 30 L. J. Q. B. 261; *Grice v. Richardson*, 1877, 3 App. Cas. 319.

⁹ *Norman v. Phillips*, 1845, 14 L. J. Ex. 306; *Smith v. Surman*, 1829, 9 B. & C. 561; *Howe v. Palmer*, 1820, 3 B. & Ald. 321; *Hansom v. Armitage*, 1822, 5 B. & Ald. 559; *Acebal v. Levy*, 1834, 10 Bing. 384. In *Morton v. Tibbett*, 1850, 19 L. J. Q. B. 382, the Ct. of Q. B. denied that the proposition stated in the text was law; but, though very elaborate, the judgment is by no means satisfactory. See, also, *Parker v. Wallis*, 1855, 5 E. & B. 21; and *Currie v. Anderson*, 1859, 29 L. J. Q. B. 87.

¹⁰ *Abbott & Co. v. Wolsey*, [1895] 2 Q. B. 97 (C. A.); *Morton v. Tibbett*, 1850, 19 L. J. Q. B. 382; *Bushel v. Wheeler*, 1844, 15 Q. B. 543 n.

§§ 1045, 1046. *parties* to have the effect of transferring the right of possession from the one to the other.¹ Therefore the mere taking of a sample from the bulk,² or marking of goods, by the vendee in the vendor's shop when they are to be paid for by ready money, is not enough, as these acts, though they may constitute a valid acceptance,³ are not such a receipt by the vendee as will deprive the vendor, even when he assents to them, of his right of lien.⁴

§ 1046. Where, however, a party, having agreed to purchase some wool, sent it to another warehouse for deposit, and then weighed it *and packed it* in his own sheeting, his acts were held to be sufficient acceptance and receipt, though by the course of dealing, he was not to remove the wool to its ultimate destination before payment and no payment had been made. For the court considered that, under the circumstances, the vendor had not what could properly be called a lien on wool, but merely a special interest growing out of his original ownership, independent of the actual possession, and consistent with the property being in the purchaser.⁵ Again, where some horses were purchased of a dealer who kept a livery stable, and the buyer directed the seller to keep them at livery, upon which they were transferred from the sale to the livery stable; this direction was held equivalent to an acceptance and receipt of the horses, as the buyer became liable for their keep, which would not have been the case, unless they had actually gone into his possession;⁶ where a timber

¹ *Phillips v. Bistolli*, 1824, 2 B. & C. 514; recognised in *Maberley v. Sheppard*, 1833, 2 L. J. C. P. 181. See *Curtis v. Pugh*, 1847, 16 L. J. Q. B. 199; *Saunders v. Topp*, 1849, 18 L. J. Ex. 374; and *Tomkinson v. Staight*, 1856, 25 L. J. C. P. 85.

² *Abbott & Co. v. Wolsey*, [1895] 2 Q. B. 97 (C. A.).

³ *Cusack v. Robinson*, 1861, 30 L. J. Q. B. 261.

⁴ *Baldey v. Parker*, 1823, 2 B. & C. 37; *Bill v. Bament*, 1841, 10 L. J. Ex. 302; *Proctor v. Jones*, 1826, 2 C. & P. 532; *Kealy v. Tenant*, 1861, 13 Ir. L. R. 394; which seem virtually to overrule *Hodgson v. Le Bret*, 1 Camp. 223; and *Anderson v. Scot*, 1806, 1 Camp. 235 n. See *Saunders v. Topp*, 1849, 18 L. J. Ex. 374; and *Acraman v. Morrice*, 1849,

19 L. J. C. P. 57.

⁵ *Dodsley v. Varley*, 1840, 12 A. & E. 632; *Langton v. Higgins*, 1859, 28 L. J. Ex. 252; *Aldridge v. Johnson*, 1857, 26 L. J. Q. B. 296; *Kershaw v. Ogden*, 1865, 34 L. J. Ex. 159. See *Simmonds v. Humble*, 1862, 13 C. B. N. S. 258. As to the effect of handing over a sample of the goods, see *Gardner v. Grout*, 1857, 2 C. B. N. S. 340.

⁶ *Elmore v. Stone*, 1809, 1 Taunt. 458; explained and recognised by *Bayley, J.*, in *Smith v. Surman*, 1829, 9 B. & C. 561. See *Castle v. Sworder*, 1861, 30 L. J. Ex. 310; *Carter v. Toussaint*, 1822, 5 B. & Ald. 855; *Beaumont v. Brengeri*, 1847, 5 C. B. 301; *Holmes v. Hoskins*, 1854, 9 Ex. 753; *Marvin v. Wallace*, 1856, 25 L. J. Q. B. 369. See, also,

merchant, having bought some growing trees by verbal contract, §§ 1046—
cut down six of them and sold the lops and tops, it was held 1049.
to be too late for the vendor of the trees to countermand the
sale;¹ and where a vendee had sold to a third person part of a
stack of hay purchased by parol, and this sub-purchaser had
actually taken away his part, a jury were held justified in
finding that there had been an acceptance and actual receipt of
the whole stack.²

§ 1047. A person, intrusted with goods to sell, may himself
become the purchaser by parol, and do subsequent acts amount-
ing to an acceptance and receipt; as, for instance, if he sells
them to a stranger on his own account.³ The evidence to sustain
such a case must, however, be extremely clear.⁴

§ 1048. Where goods are ponderous and incapable of being
handed over from one to another, a constructive delivery,—such,
for example, as the giving up the key of the warehouse in which
they are deposited, or the delivery of other indicia of property,—
will be sufficient.⁵ But, in all these cases, the acts of the parties,
in order to be tantamount to a delivery and actual receipt, must
be unequivocal.⁶ Therefore, where goods are at the time of sale
in the possession of a warehouseman as agent for the vendor, the
mere acceptance and retainer by the purchaser of the warrant or
delivery order, will not amount to an actual receipt of the goods,
so as to bind the bargain.⁷ To have this effect, the document
must be lodged by the purchaser with the warehouseman, who
must then, as it were, attorn to him, or in other words, agree to
hold the property henceforth as his agent.⁸

§ 1049. One of the chief difficulties upon questions as to the
actual receipt and acceptance of goods which have been the sub-
jects of sale, arises where goods, verbally purchased, are delivered

Taylor v. Wakefield, 1856, 6 E. & B.
765.

¹ *Marshall v. Green*, 1875, 45 L. J.
C. P. 153.

² *Chaplin v. Rogers*, 1800, 1 East,
192; recognised by Bayley, J., in
Smith v. Surman, 1829, as reported
9 B. & C. 570. See *Stoveld v.*
Hughes, 1811, 14 East, 308; and
Searle v. Keeves, 1797, 2 Esp. 598.

³ *Edan v. Dudfield*, 1841, 1 Q. B.
302; *Lillywhite v. Devereux*, 1846,

15 M. & W. 291.

⁴ *Id.*

⁵ *Chaplin v. Rogers*, 1800, 1 East,
192.

⁶ *Nicholle v. Plume*, 1824, 1 C. &
P. 272; *Edan v. Dudfield*, 1841, 1
Q. B. 302.

⁷ *M'Ewan v. Smith*, 1849, 2
H. L. C. 309 (H. L.).

⁸ *Farina v. Home*, 1846, 16 L. J.
Ex. 73; *Bentall v. Burn*, 1824, 5 D.
& R. 284.

§ 1049. to a carrier or wharfinger named by the vendee. It seems to have been once considered, that such delivery was sufficient to satisfy the statute.¹ It has since, however, been held, that though the delivery to the carrier may be a delivery to and "receipt" by the purchaser, the acceptance of the carrier is not an "acceptance" by such purchaser.² Therefore, where timber, verbally ordered, was forwarded in this manner to the purchaser, but he refused to take it in, a jury were held not to be warranted in finding an acceptance, though an invoice had been sent to the purchaser and retained by him, and though he had omitted to give notice to the vendor of his refusal to take the goods till after the expiration of more than *one* month.³ Under somewhat similar circumstances, however, where no rejection of the goods had taken place for *seven* months, an opposite decision was arrived at, Coleridge, J., resting his judgment on the ground that the inspection of the goods was to be made within a reasonable time.⁴ Whether this particular distinction can be supported is perhaps a question. But it is at least clear that, as a general rule, if a purchaser, who has the right of approval, retains for an unreasonable time goods which have been delivered to him, he will lose his right to object to them, and his conduct will amount to an acceptance;⁵ and further, the same principle will also hold, if the goods have been delivered to a general agent of the purchaser, who was authorised by him to examine their quality.⁶ It also is clear, that, if the purchaser of goods takes upon himself to exercise a dominion over them, and deals with them in a manner inconsistent with the right of property continuing in the vendor, —as, for instance, if he changes their original destination, or

¹ *Hart v. Sattley*, 1814, 3 Camp. 528. See *Dawes v. Peck*, 1799, 8 T. R. 330; and *Dutton v. Solomonson*, 1803, 3 Bos. & P. 582.

² *Johnson v. Dodgson*, 1837, 6 L. J. Ex. 185. See *Acebal v. Levy*, 1834, 10 Bing. 384; *Coates v. Chaplin*, 1842, 11 L. J. Q. B. 315; *Nicholson v. Bower*, 1858, 28 L. J. Q. B. 97.

³ *Norman v. Phillips*, 1845, 14 L. J. Ex. 306; *Meredith v. Meigh*, 1853, 22 L. J. Q. B. 401; *Hunt v. Hecht*, 1853, 22 L. J. Ex. 293; *Hart v. Bush*, 1858, 27 L. J. Q. B. 271;

Coombs v. Bristol & Ex. Rail. Co., 1858, 27 L. J. Ex. 401; *Smith v. Hudson*, 1865, 34 L. J. Q. B. 145.

⁴ *Bushel v. Wheeler*, 1844, 15 Q. B. 543 n; explained by *Alderson, B.*, in *Norman v. Phillips*, 1845, as reported 14 M. & W. 282. See, also, *Currie v. Anderson*, 1860, 29 L. J. Q. B. 87.

⁵ *Coleman v. Gibson*, 1832, 1 M. & Rob. 168; *Norman v. Phillips*, 1845, 14 L. J. Ex. 306; *Bowes v. Pontifex*, 1863, 3 F. & F. 739.

⁶ *Norman v. Phillips*, 1845, 14 L. J. Ex. 306.

resells them to a third party at a profit,—the jury will be justified in finding that he has accepted the goods and actually received them, though they have been merely delivered to his carriers, and he himself has never seen them.¹

§§ 1049,
1050.

§ 1050. We may now leave the consideration of the Statute of Frauds. The next statute by which matters are required to be evidenced by writing, in the cases specified, is "*The Wills Act, 1837.*"² This came into operation 1st January, 1838,³ and effected extensive amendments in the law respecting these instruments. It will here be expedient to notice such of the alterations as relate to the *execution of wills*. By the Act, every will, codicil, or other testamentary disposition,—including appointments made by will, or by writing in the nature of a will, in exercise of any power,⁴ whether such power were created before or after the Act came into operation,⁵ but excluding nuncupative wills, disposing of personal estate, made by soldiers in actual military service, or by seamen and mariners at sea,⁶—if made, or re-executed, or re-published, or revived by any codicil, on or after the 1st January, 1838,⁷ must be in writing, "and be signed at the foot or end thereof by the testator, or by some other person in his presence,⁸ and by his direction; and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time, and such witnesses shall attest and shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary."⁹ Appointments

¹ *Morton v. Tibbett*, 1850, 19 L. J. Q. B. 382; explained by *Martin, B.*, in *Hunt v. Hecht*, 1853; 22 L. J. Ex. 293.

² 7 W. 4 & 1 V. c. 26.

³ The Act is due to the exertions of *Ld. Langdale*.

⁴ §§ 1 and 10.

⁵ *Hubbard v. Lees*, 1866, L. R. 1 Ex. 255.

⁶ § 11. As to nuncupative wills, see post, § 1062, and 1 Will. on Ex. 62—89.

⁷ § 34.

⁸ *Kevil v. Lynch*, 1873, Ir. R. 8 Eq. 244.

⁹ § 9. A will written in *pencil* has been decided to be a good will; *Dickenson v. Dickenson*, 1814, 2

Phillim. Ecc. 173; *Re Dyer*, 1828, 1 Hagg. Ecc. 219; but not (as decided in America) one written on a *slate*. *Reed v. Woodward*, 11 Phila. (Pa.) 54, 541 (Am.). But it may be in the form of a letter if intended to be testamentary and properly executed. *Cowley v. Knapp*, 1886, 42 N. J. L. 297 (Am.). § 7 of the Indian Will Act, No. 25, of 1838, contains the same language, with the single omission of the words "shall attest and" after "witnesses," and before "shall subscribe." This alteration makes no difference in the construction. *Ld. Brougham in Casement v. Fulton*, 1845, 5 Moo. P. C. C. 139, P. C.

§§ 1050— by will, if executed in this manner, are valid, although the
1052. power, under which they were made, expressly requires some additional solemnity in the execution;¹ and all wills, executed as above stated, are to be deemed good without other publication.²

§ 1051. With the view, however, of preventing frauds, to which seafaring men are supposed to be more than ordinarily subject, the Act requires the wills of petty officers and seamen in the Royal Navy, and non-commissioned officers of marines, and marines, so far as relates to their wages, pay, prize-money, bounty-money, allowances, and moneys payable in respect of services in her Majesty's Navy,³ to be drawn, executed, and attested in a more formal manner than instruments made by other persons, who are presumed to have greater experience.⁴

§ 1052. In contrasting the provisions in "The Wills Act, 1837," with those formerly contained in the Statute of Frauds,⁵ it will be observed, first, that the present Wills Act is not confined (as the Act of Charles II. was) to devises of freehold realty, but it applies equally to *all* wills, whether of freehold, copyhold, or personalty secondly, that it makes two attesting witnesses sufficient and necessary in all cases, whereas the former statute required the signature of at least three to all devises of freehold realty, but was silent as to other wills; thirdly, that the testator must make or acknowledge⁶ his signature in the *actual contemporaneous presence* of the witnesses,⁷ though this was not necessary under the former Act; and fourthly, that the will must be signed "at the foot or end thereof," whereas, formerly, the signature was sufficient if appearing in any part of the instrument.⁸ It also has been further laid down that under the Wills Act both the attesting

¹ § 10. See, however, and compare *Buckell v. Bleakhorn*, 1846, 5 Hare, 131; *Collard v. Sampson*, 1833, 22 L. J. Ch. 729; *West v. Ray*, 1854, 23 L. J. Ch. 447; *Taylor v. Meads*, 1865, 34 L. J. Ch. 203; and *Smith v. Adkins*, 1872, L. R. 14 Eq. 402.

² § 13. As to the meaning of the phrase "publication of a will," see *Vincent v. Bp. of Sodor and Man*, 1851, 20 L. J. Ch. 433, and cases there cited.

³ § 12.

⁴ 11 G. 4 & 1 W. 4, c. 20, §§ 48—50; 28 & 29 V. c. 72 (amended by 60 V. c. 15), and c. 112, § 1.

⁵ 29 C. 2, c. 3, § 5; 7 W. 3, c. 12, § 3, 1r.

⁶ See *Morritt v. Douglass*, 1872, L. R. 3 P. & D. 1.

⁷ Presence in the same room is insufficient, but both witnesses must contemporaneously see the testator sign or acknowledge his signature, *Brown v. Skirrow*, [1902] P. 3.

⁸ Post, § 1057.

witnesses must *subscribe* the will *at the same time* and *in each other's presence*; and that a will signed in the presence of a single witness who then attested it, his signature to which the testator acknowledged subsequently, in the presence of this witness and another, who thereupon also witnessed it, was not properly attested notwithstanding that on the second occasion the first witness had acknowledged, although he had not re-written his own signature.¹ Again, where one of the witnesses to a will, on the occasion of its being re-executed in his presence, retraced his signature with a dry pen,² and also where another witness, under similar circumstances, corrected an error in his name as previously written, and added the date,³ the Court in both these cases held that there had not been a sufficient compliance with the statute.⁴

§ 1053. The word "presence," mentioned in the statute, means not only a bodily, but a mental and visual presence. Therefore, the Act will not be satisfied, if either of the witnesses be insane, intoxicated, asleep, or, it would seem, even blind⁵ or inattentive, at the time when the will is signed or acknowledged.⁶ So strictly indeed has this rule been interpreted, that probate was rejected where a testator had only acknowledged a paper to be his will in the presence of two witnesses, neither of whom had seen him sign it, nor seen his signature at the time of their subscription, though both witnesses said that they had seen the testator writing on the paper, and the will, when produced, actually bore his signature.⁷

§ 1054. A somewhat less stringent construction has, however,

¹ *Casement v. Fulton*, 1845, 5 Moo. P. C. C. 140 (P. C.); *Moore v. King*, 1842, 3 Curt. 243. In *re Simmonds*, 1842, 3 Curt. 79; In *re Allen*, 1839, 2 Curt. 331; *Slack v. Busted*, 1856, 6 Ir. Ch. R. 1; *Wyatt v. Berry*, 1893, P. 5. See, however, *Faulds v. Jackson*, 1845, 6 Notes of Cases Ecc. and Mar. Supp. 1.; and In *re Webb*, 1855, 1 Deane, Ecc. R. 1, in which last case, Sir J. Dodson, on the authority of an unreported decision of Sir H. Fust, in *Chodwick v. Palmer*, 1851, held that the witnesses need not subscribe the will in the presence of each other.

² *Playne v. Scriven*, 1849, 1 Roberts. 772. See post, § 1113.

³ *Hindmarsh v. Charlton*, 1861, 8 H. L. C. 160.

⁴ In *re Eynon*, 1873, L. R. 3 P. & D. 92.

⁵ See In *re Mullen*, 1871, Ir. R. 5 Eq. 309, where a blind testator was held capable of acknowledging his signature to his will.

⁶ *Hudson v. Parker*, 1844, 1 Roberts. 24.

⁷ *Hudson v. Parker*, 1844, 1 Roberts. 24; *Blake v. Blake*, 1882, 7 P. D. 102 (C. A.). But see *Smith v. Smith*, 1868, 35 L. J. P. & M. 65.

**§§ 1054,
1055.**

been put on that part of the Act which requires the witnesses to subscribe in the presence of the testator. For although if their signatures were not attached in the testator's room, proof would be required to show that he was in such a position as to have been able to see them write,¹ yet a will was admitted to probate where a testator, being in bed, did not exactly see one of the witnesses sign, in consequence of a curtain being drawn, but both the witnesses had really signed in his room, and in each other's presence.² This distinction is adopted in consequence of the vast difference which exists in the relative importance of the two acts, and in the objects they are intended to answer. The witnesses are to see the signature made or acknowledged, because they are subsequently to attest it; but they are to subscribe the will in the presence of the testator, chiefly for the purpose of formally completing it; and although they cannot depose to the signature of the testator being made or acknowledged in their presence, unless they see the act, they may bear witness to their subscription in the presence of the testator, though he did not actually see them sign.³ An attestation while the alleged testator is insensible is, however, of course, bad,⁴ and his subsequent declarations that he did not *knowingly* see them sign a will, are admissible.⁵

§ 1055. In enacting that the testator must "make or acknowledge" his signature in the presence of witnesses, the Legislature did not intend to confine the acknowledgment to cases where the signature was made "by some other person" than the testator, but it meant it to apply equally to those cases where the signature had been previously made by himself.⁶ In making the acknowledgment,⁷ it is not necessary that the testator should actually point out to the witness his name, and say, "This is my name, or my handwriting;" but if he states that the whole instrument

¹ Carter v. Seaton, 1901, 85 L. T. 76 (Gorell Barnes, J.); Norton v. Bazett, 1856, Deane, Ecc. R. 259. Ante, § 163.

² Newton v. Clarke, 1839, 2 Curt. 320. But see Tribe v. Tribe, 1849, 1 Roberts. 775; In re Killick, 1865, 3 S. & T. 578. Ante, § 163.

³ Hudson v. Parker, 1844, 1 Roberts. 24.

⁴ Right v. Price, 1779, 1 Doug. 241.

⁵ Canada's Appeal, 1880, 47 Conn. 450 (Am.).

⁶ In re Cornelius Regan, 1838, 1 Curt. 908, recognised in Hott v. Genge, 1842, 3 Curt. 174.

⁷ The acknowledgment *may* be made by a blind testator, In re Mullen, 1871, Ir. R. 5 Eq. 309.

was written by himself,¹ or if he produces a paper as his will, and requests the witnesses to put their names *underneath his*,² or if he intimates by gestures that he has signed the will, and that he wishes the witnesses to attest it,³ or even, it seems, if he shows a paper in his handwriting to the witnesses and desires, or allows a bystander to desire,⁴ them to sign it, though he does not state and the witnesses do not know that such paper is his will,⁵ this will be a sufficient acknowledgment of his signature, if it clearly appears that, at the time of making the statement or producing the document, the signature was really affixed, and was actually seen at the same time by the necessary witnesses when they signed at the testator's request. Unless, however, the judge is satisfied that the witnesses before they subscribed the will, either saw the testator sign it or saw his signature attached to it, he must pronounce against its validity; for the statute requires, not that the *will*, but that the *signature*, should be attested.⁶ It follows from this rule, that if the witnesses sign before the testator the will is void, though the testator affixes his signature in their presence immediately afterwards, and though they subsequently seal the document.⁷

§§ 1055,
1056.

§ 1056. But it is not absolutely essential to the validity of a will that positive affirmative evidence should be given by the subscribing witnesses that the testator either signed it, or acknowledged his signature to it, in their presence, since the Court may *presume due execution* under the circumstances. Thus, where, three years

¹ *Blake v. Knight*, 1843, 3 Curt. 563.

² *Gaze v. Gaze*, 1843, 3 Curt. 451.

³ *In re Davies*, 1849, 2 Roberts. 377.

⁴ See *Faulds v. Jackson*, 1845, 6 Notes of Cases, Ecc. & Mar. Supp. i.; *Inglesant v. Inglesant*, 1874, L. R. 3 P. & D. 172.

⁵ *Keigwin v. Keigwin*, 1843, 3 Curt. 607; *In re Ashmore*, 1843, 3 Curt. 758 (Sir H. Fust); *In re Bosanquet*, 1852, 2 Roberts. 577; *In re Dinmore*, 1853, 2 Roberts. 641; *In re Jones*, 1855, Deane, Ecc. R. 3; *White v. Trustees of British Museum*, 1829, 6 Bing. 310; *Wright v. Wright*, 1831, 7 Bing. 457; *Johnson v. Johnson*, 1832, 2 L. J. Ex. 73. It may,

however, be pointed out that in such cases there is nothing to direct the attention of the witnesses to the alleged testator's mental state.

⁶ *Hudson v. Parker*, 1844, 1 Roberts. 24; *Blake v. Blake*, 1882, 7 P. D. 102 (C. A.); *Ilott v. Genge*, 1842, 3 Curt. 174; *Countess de Zichy Ferraris v. M. of Hertford*, 1843, 3 Curt. 479; *In re Summers*, 1850, 2 Roberts. 295; *In re Pearsons*, 1864, 33 L. J. P. & M. 177; *Fischer v. Popham*, 1875, L. R. 3 P. & D. 246.

⁷ *In re Byrd*, 1842, 3 Curt. 117; *In re Olding*, 1841, 2 Curt. 865; *Cooper v. Bockett*, 1844, 4 Moo. P. C. C. 419; *Burke v. Moore*, 1875, Ir. R. 9 Eq. 609.

§ 1056. after the supposed execution, the witnesses deposed that they went to the house of the deceased, who, as writer to an attorney, was presumed to be conversant with business, to see him sign his will; that he then produced a paper, telling them that it was his will and in his handwriting; that he read over the attestation clause, and the introductory words, and pointed out a mistake which had been rectified in the body of the instrument; that he did not sign in their presence; that when they attested the paper no seal was upon it, but they could not positively swear that there was no signature; Sir Herbert Jenner Fust granted probate, though the will, when produced, was not only signed but sealed.¹ So, also, if a will contain an attestation clause, and purport to be duly signed by the testator and two witnesses, the Court will *prima facie* presume, when it is proved that the witnesses are dead or cannot be found, or in the event of their not remembering the facts attendant on the execution,² that the statute has been complied with, and that *omnia rite esse acta*.³ If, however, *one* witness assert that he does remember, and positively negatives signing or acknowledgment of signature by the alleged testator in his presence, the document set up cannot be admitted to probate,⁴ unless the Court from the surrounding circumstances thinks fit to doubt his evidence.⁵ The presumption *omnia præsumuntur rite esse acta* may also be recognised even in cases where no attestation clause is attached to the will,⁶ and where circumstances

¹ *Blake v. Knight*, 1843, 3 Curt. 563. See, also, *Beckett v. Howe*, 1869, L. R. 2 P. & D. 1; *Olver v. Johns*, 1870, 39 L. J. P. & M. 7; *Kelly v. Keatinge*, 1871, Ir. R. 5 Eq. 174; *In re Janaway*, 1875, 44 L. J. P. & M. 6.

² *Whiting v. Turner*, 1903, 89 L. T. 71 (*Bucknill, J.*).

³ *Baxendale v. De Valmer*, 1887, 57 L. T. 556; *Wright v. Sanderson*, Times, 28th Feb., 1884 (C. A.); *Burgoyne v. Showler*, 1844, 1 Roberts. 5; *Hitch v. Wells*, 1846, 10 Beav. 84; *In re Leach*, 1848, 6 Notes of Cases, Ecc. & Mar. 92; *Leech v. Bates*, 1849, 1 Roberts. 714; *In re Rees*, 1895, 34 L. J. P. & M. 56; *Brenchley v. Still*, 1850, 2 Roberts. 162; *Thomson v. Hall*, 1852, 2 Roberts. 426; *In re Holgate*, 1859, 29 L. J. P. 161;

Lloyd v. Roberts, 1858, 12 Moo. P. C. C. 158 (P. C.); *Foot v. Stanton*, 1856, Deane, Ecc. R. 19; *Reeves v. Lindsay*, 1869, Ir. R. 3 Eq. 509; *Vinnicombe v. Butler*, 1865, 34 L. J. P. & M. 18; *Smith v. Smith*, 1866, 35 L. J. P. & M. 65; *O'Meagher v. O'Meagher*, 1883, 11 L. R. Ir. 117. See *Croft v. Croft*, 1865, 4 S. & T. 10; and *Wright v. Rogers*, 1869, L. R. 1 P. & D. 678.

⁴ *Greenleaf on Ev.* 15th edit., 1892, 369, citing *Noding v. Alleston*, *Shaw v. Neville*, *Bennett v. Sharpe*.

⁵ *Lloyd v. Roberts* (1858) 12 Moo. P. C. 158; *Bailey v. Frowan*, 1871, 19 W. R. 511; *Myers v. Gibson*, 1866, 14 W. R. 901; *O'Meagher v. O'Meagher*, 1883, 11 L. R. Ir. 117.

⁶ *In re Peverett*, [1902] P. 205 (*Jeune, P.*); *In re Thomas*, 1859, 1

exist, which a non legal mind might well deem sufficiently suspicious to justify a very different inference.¹ §§ **1056—1058.**

§ 1057. It was at one time thought, and has always been held in Ireland,² that the clause requiring the testator to sign "at the foot or end" of the testament would be satisfied, though the will itself were wholly written on the first side of a sheet of paper, and the attestation and signature were attached to the second, or even the third side.³ Ultimately, however, a much stricter construction was put upon the Act, and very many wills were refused probate, because the testator had inadvertently permitted a trifling blank space to be interposed between the final word of the instrument and his signature.⁴ But in 1852, Lord Chancellor St. Leonards carried an Act,⁵ which has remedied the principal evils that arose from the former state of the law.

§ 1058. The first section of this Act enacts that "Every will shall, so far only as regards the position of the signature of the testator, or of the person signing for him as aforesaid, be deemed to be valid within the said enactment, as explained by this Act, if the signature shall be so placed at, or after, or following, or under, or beside, or opposite⁶ to the end of the will, that it shall be apparent on the face of the will that the testator intended to give effect by such his signature to the writing signed as his will,"⁷ and

S. & T. 255 (Sir C. Crosswell); *Gwillim v. Gwillim*, 1860, 29 L. J. P. & M. 31; *Vinnicombe v. Butler*, 1865, 34 L. J. P. & M. 18.

¹ *Trott v. Skidmore*, 1860, 29 L. J. P. & M. 156; *In re Huckvale*, 1867, L. R. 1 P. & D. 375; *In re Pearn*, 1875, 1 P. D. 70. But see *Pearson v. Pearson*, 1872, L. R. 2 P. & D. 451.

² *Derinzy v. Turner*, 1851, 1 Ir. Ch. R. 341.

³ *In re Gore*, 1843, 3 Curt. 758; *In re Carver*, 1842, 3 Curt. 29.

⁴ See *Smee v. Bryer*, 1848, 6 Moo. P. C. C. 604 (P. C.); *In re Howell*, 1848, 6 Notes of Cases, Ecc. & Mar. 20, 406; *In re Corder*, 1848, 6 Notes of Cases, Ecc. & Mar. 556; *In re Attridge*, 1848, 6 Notes of Cases, Ecc. & Mar. 597. Where testator signed between the testimonium clause and words descriptive merely of the witnesses, probate was granted; *In re Cotton*, 1848, 6 Notes of Cases, Ecc.

& Mar. 307. See, also, *In re Beadle*, 1849, 1 Roberts. 749; *In re Standley*, 1849, 1 Roberts. 755; *In re Brown*, 1849, 1 Roberts. 710; *In re Banly*, 1849, 1 Roberts. 751; *In re Hellings*, 1849, 1 Roberts. 753; *In re Hearn*, 1849, 2 Roberts. 112; *In re Odell*, 1849, 7 Notes of Cases, Ecc. & Mar. 267; *In re Batten*, 1849, 7 Notes of Cases, Ecc. & Mar. 288; *Holbech v. Holbech*, 1849, 7 Notes of Cases, Ecc. & Mar. 294; *In re Minty*, 1850, 7 Notes of Cases, Ecc. & Mar. 374; *In re Hill*, 1849, 1 Roberts. 276; *In re White*, 1850, 2 Roberts. 194.

⁵ 15 & 16 V. c. 24.

⁶ *In re Williams*, 1865, L. R. 1 P. & D. 4; *In re Coombs*, 1866, L. R. 1 P. & D. 302.

⁷ See *Cook v. Lambert*, 1863, 32 L. J. P. & M. 93, where a signature written on a piece of paper, previously wafered to the foot of the will, was held sufficient. See, also, *In re*

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1059.**

that no such will shall be affected by the circumstance that the signature shall not follow or be immediately after the foot or end of the will, or by the circumstance that a blank space shall intervene between the concluding word of the will and the signature, or by the circumstance that the signature shall be placed among the words of the testimonium clause or of the clause of attestation,¹ or shall follow or be after or under the clause of attestation, either with or without a blank space intervening, or shall follow or be after,² or under, or beside the names or one of the names of the subscribing witnesses, or by the circumstance that the signature shall be on a side or page or other portion of the paper or papers containing the will, whereon no clause or paragraph or disposing part of the will shall be written above the signature,³ or by the circumstance that there shall appear to be sufficient space on or at the bottom of the preceding side, or page, or other portion of the same paper on which the will is written, to contain the signature;⁴ and the enumeration of the above circumstances shall not restrict the generality of the above enactment;⁵ but no signature under the said Act or this Act shall be operative to give effect to any disposition or direction which is underneath⁶ or which follows it,⁷ nor shall it give effect to any disposition or direction inserted after the signature shall be made."⁸ Where a will, written on several pages of paper has been signed and witnessed at the foot of the first page only, that page has been admitted to probate.⁹

§ 1059. Although the testator is, for obvious reasons, required by the Wills Act to sign the will "at the foot thereof," the Act

Gausden, 1863, 31 L. J. P. & M. 53; In re Hammond, 1862, 32 L. J. P. & M. 200; In re West, 1862, 32 L. J. P. & M. 182; In re Wright, 1865, 34 L. J. P. & M. 104. But see In re M'Key, 1876, Ir. R. 11 Eq. 220.

¹ In re Mann, 1859, 28 L. J. P. & M. 19; In re Casmore, 1869, L. R. 1 P. & D. 653.

² In re Puddelphatt, 1870, L. R. 2 P. & D. 97; In re Jones, 1877, 46 L. J. P. D. & A. 80.

³ In re Archer, 1871, L. R. 2 P. & D. 252.

⁴ Hunt v. Hunt, 1866, L. R. 1 P. & D. 209; In re Rice, 1870, Ir. R. 5 Eq. 176.

⁵ See In re Wotton, 1874, L. R. 3 P. & D. 159.

⁶ See In re Kimpton, 1864, 33 L. J. P. & M. 153; In re Woodley, 1864, 33 L. J. P. & M. 154; In re Jones, 1864, 34 L. J. P. & M. 41; In re Powell, 1864, 34 L. J. P. & M. 107; In re Ainsworth, 1870, L. R. 2 P. & D. 131.

⁷ See Sweetland v. Sweetland, 1865, 24 L. J. P. 42; In re Birt, 1871, L. R. 2 P. & D. 214; In re Dilkes, 1874, L. R. 3 P. & D. 166; Royle v. Harris, 1895, P. 163.

⁸ These provisions apply to wills already made, see § 2.

⁹ Millward v. Buswell, 1904, 20 T. L. R. 714 (Gorell Barnes, J.).

points out no place for the signature of the witnesses, and a testament is duly executed, even where the attestation clause and the signatures of the witnesses are indorsed upon it.¹ The Court, however, in all such cases must be satisfied that the signatures, wherever placed, were really intended to attest the operative signature of the testator.²

§ 1060. Under the Wills Act of 1838, as under the Statute of Frauds, a testator may have his hand guided by another person,³ or he may sign by his mark or initials only,⁴ though his name does not appear, or though a wrong name does by mistake appear,⁵ in the body of the will;⁶ and the attesting witnesses, whether they can write or not, may also sign as marksmen;⁷ and if one of them can neither read nor write, he may still sign his name by having his hand guided by the other.⁸ It is even sufficient for witnesses to subscribe the will by their initials.⁹ In consequence of the provisions in the Wills Act that "no form of attestation shall be necessary," a mere subscription of two names, without any memorandum to show that the parties have subscribed as witnesses, will satisfy the statute.¹⁰ Even writing their names in its margin opposite to alterations, &c., in a will, where the Court is satisfied

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1060.

¹ In re Chamney, 1849, 7 Notes of Cases, Ecc. & Mar. 70. See In re Taylor, 1851, 2 Roberts. 711.

² Phipps v. Hale, 1874, L. R. 3 P. & D. 166.

³ Wilson v. Beddard, 1846, 12 Sim. 28.

⁴ Baker v. Denning, 1838, 8 A. & E. 94; In re Blewitt, 1880, 5 P. D. 116. Where a testator has signed by a mark, no collateral inquiry will be allowed as to his capacity to have written his name; and no proof is required that the will was read over to him; Clarke v. Clarke, 1868, Ir. R. 2 C. L. 395. Sealing a will is not a sufficient signing: Smith v. Evans, 1851, 1 Wils. 313; Grayson v. Atkinson, 1752, 2 Ves. sen. 459.

⁵ In re Douce, 1862, 31 L. J. P. 172; In re Clarke, 1858, 27 L. J. P. & M. 18.

⁶ In re Bryce, 1839, 2 Curt. 325.

⁷ In re Amis, 1849, 2 Roberts. 116; Clarke v. Clarke, 1879, 3 L. R. Ir. 306. But an attesting witness cannot subscribe a will in another

person's name: Pryor v. Pryor, 1860, 29 L. J. P. & M. 114.

⁸ Harrison v. Elvin, 1842, 11 L. J. Q. B. 197; In re Lewis, 1862, 31 L. J. P. 153; In re Frith, 1858, 27 L. J. P. & M. 6; Lewis v. Lewis, 1861, 2 S. & T. 153; Roberts v. Phillips, 1855, 24 L. J. Q. B. 171.

⁹ In re Christian, 1849, 2 Roberts. 110; In re Blewitt, 1880, 5 P. D. 116. See In re Trevanion, 1850, 2 Roberts. 311; Hindmarsh v. Charlton, 1861, 8 H. L. C. 160, cited ante, § 1052. See, too, In re Sperling, 1864, 33 L. J. P. & M. 25, where a witness, instead of signing his name, wrote "servant to M. S." and this was held sufficient. But where an infirm witness, intending to sign his name, could only write "Saml.," and omitted his surname, the signature was held to be insufficient: In re Maddock, 1874, L. R. 3 P. & D. 169.

¹⁰ Bryan v. White, 1850, 2 Roberts. 315. See Griffiths v. Griffiths, 1871, L. R. 2 P. & D. 300.

§§ 1060,
1061.

that it was done with intent to attest it, is a sufficient attestation.¹ Under either Act, any person, as, for instance, one of the two attesting witnesses may write,² or even stamp,³ the testator's signature by his direction. Even where the drawer of a will, being requested by the testator to sign for him, put *his own* signature to the instrument, this was held to be sufficient, as the Act does not say that the signature must bear the testator's name.⁴ The witnesses, however, must attest the will, either by their signature or their marks, and when a stranger, at the request of the testator, signed for one of the witnesses who was unable to write, probate was refused.⁵

§ 1061. A paper imperfect in itself may, by *clear reference* to it as an *existing* document,⁶ be identified with a will which has been validly executed in such a way as to form part of such will, and if this be the case, the defect of authentication arising from such paper being unattested or unexecuted will be cured.⁷ Unattested wills and codicils have thus constantly been set up by subsequent attested codicils which have confirmed them.⁸ Where, however, a testator at the foot of a valid will of 1833 made two codicils prior to the 1st of January, 1838, and five more after that

¹ In the goods of Streathley, 1891, P. 172.

² Smith v. Harris, 1845, 1 Roberts. 262; In re Bailey, 1838, 1 Curt. 914.

³ Jenkins v. Gaisford, 1863, 37 L. J. P. & M. 122. See Bennett v. Brumfitt, 1867, L. R. 3 C. P. 28; and ante, § 1029.

⁴ In re Clark, 1839, 2 Curt. 329. See, also, In re Blair, 1848, 6 Notes of Cases, Ecc. & Mar. 528.

⁵ In re Cope, 1850, 2 Roberts. 335; In re Duggins, 1870, 39 L. J. P. 24.

⁶ Singleton v. Tomlinson, 1878, 3 App. Cas. 404 (H. L.); In re Kehoe, 1884, 13 L. R. Ir. 13; Dickinson v. Stidolph, 1861, 11 C. B. N. S. 341; Van Straubenzee v. Monck, 1863, 32 L. J. P. & M. 21; In re Greves, 1859, 28 L. J. P. & M. 28; Allen v. Maddock, 1858, 11 Moo. P. C. C. 427; In re Almosnino, 1860, 29 L. J. P. & M. 46; In re Brewis, 1864, 33 L. J. P. & M. 124; In re Luke, 1865, 34 L. J. P. & M. 105; In re Lady Truro, 1866, 35 L. J. P. & M. 89; In re Sunderland, 1866, 35 L. J. P. &

M. 82; In re Watkins, 1865; In re Dallow, 1866, 35 L. J. P. & M. 81. See post, § 1195, ad fin.

⁷ Countess de Zichy Ferraris v. M. of Hertford, 1843, 3 Curt. 493; In re Lady Durham, 1842, 3 Curt. 57; In re Dickins, 1842, 3 Curt. 60; In re Willesford, 1842, 3 Curt. 77; Habergham v. Vincent, 1793, 2 Ves. 204; In re Edwards, 1848, 6 Notes of Cases, Ecc. & Mar. 306; In re Ash, 1856, Deane, Ecc. R. 181; In re Lady Pembroke, 1856, Deane Ecc. R. 182; In re Stewart, 1863, 32 L. J. P. & M. 94. See ante, § 1026.

⁸ Aaron v. Aaron, 1849, 3 De G. & Sm. 475; Utterton v. Robins, 1834, 1 A. & E. 423; Gordon v. Ld. Reay, 1832, 5 Sim. 274; Doe v. Evans, 1832, 1 C. & M. 42; Allen v. Maddock, 1858, 11 Moo. P. C. C. 427; In goods of Heathcote, 1881, 6 P. D. 30. See In re Allnutt, 1864, 33 L. J. P. & M. 86; Anderson v. Anderson, 1872, L. R. 13 Eq. 381; and especially Burton v. Newbery, 1875, 1 Ch. D. 234; and Green v. Tribe, 1878, 9 Ch. D. 231.

date, but the whole seven of these codicils were altogether unattested, and the testator then in 1847 duly executed an eighth codicil on a separate paper, which he described as "a codicil to his will," it was held that the five unattested codicils were not rendered valid by the eighth codicil, as they, legally and technically speaking, formed no part of the testator's will.¹

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1062.

§ 1062. By § 11 of "The Wills Act, 1837," all wills of personal estate made by "any soldier being in actual military service, or any mariner or seaman being at sea," are exempted from the operation of the Act. The word "soldier" here includes all officers and soldiers who have been in the employ of the East India Company, as well as those in her Majesty's service.² The privilege is confined to such soldiers as are actually *on an expedition*; ³ consequently, officers quartered with their regiments in barracks, or otherwise forming part of a stationary force, whether at home or in the colonies, are not within the exception.⁴ A soldier, however, has been held to be sufficiently "in expeditione" who has taken some step under orders, in view of, and preparatory to, joining the force in the field,⁵ and even where the force to which he belongs has been ordered to mobilise for service in the field, although the particular soldier himself has taken no step under the order; ⁶ a declaration, made by a soldier on active service at the instance of the military authorities, who made a note of it at the time, that he desired his effects to be credited to a named person in the event of his death, has been held to be a valid testamentary document.⁷ The Act applies to seamen in the merchant, as well as in the Queen's, service,⁸ and the purser of a man-of-war,⁹ and

¹ Haynes v. Hill, 1849, 7 Notes of Cases, Ecc. & Mar. 256. See, also, Johnson v. Ball, 1851, 21 L. J. Ch. 210; In re Drummond, 1880, 3 Curt. 522; In re Tovey, 1878, 1 P. D. 150; Stockil v. Punshon, 1880, 6 P. D. 9; In re Mathias, 1863, 32 L. J. P. & M. 115; In re Wyatt, 1862, 31 L. J. P. & M. 197; In re Lady Truro, 1866, 35 L. J. P. & M. 89; In re Hall, 1871, L. R. 2 P. & D. 256.

² Shearman v. Pyke, 1724, cited 3 Curt. 539—542.

³ See Herbert v. Herbert, 1855, Deane Ecc. R. 10.

⁴ Drummond v. Parish, 1843, 3 Curt. 522; In re Hill, 1845, 1 Roberts. 276; White v. Repton, 1844, 3 Curt. 818; Bowles v. Jackson, 1854, 1 Notes of Cases, Ecc. & Mar. 294.

⁵ In Re Hiscock, [1901] P. 78 (Jeune, P.).

⁶ Gattward v. Knee, [1902] P. 99 (Jeune, P.); May v. May, [1902] P. 103 n. (Gorell Barnes, J.).

⁷ In re Scott, [1903] P. 243 (Jeune, P.).

⁸ In re Milligan, 1849, 2 Roberts. 108.

⁹ In re Hayes, 1839, 9 Curt. 338 (Am.)

§§ 1062—
1063.

a surgeon in the navy,¹ are both included in the term "seamen." The exception extends to an invalided seaman, who is returning home from foreign service in a passenger ship,² to a naval officer whilst engaged in an expedition up a river,³ and to a seaman serving on a ship permanently stationed in harbour,⁴ or lying in a river preparatory to sailing to sea.⁵ But it does not extend to an admiral in command of a fleet in the colonies, who lives with his family on shore at his official residence.⁶ Material alterations contained in soldiers' wills may, in the absence of evidence, be presumed to have been made while the respective testators were employed in actual military service.⁷

§ 1062A. The Wills Act was originally held to apply to the testamentary papers of all domiciled Englishmen excepting those specified in the last section, even when such papers were executed in foreign countries.⁸ This, however, being found in practice productive of injustice, the Legislature in 1861 passed "The Wills Act, 1861,"⁹ which in substance enacts that every will made out of the United Kingdom by a British subject, whatever his domicile may be, shall, as regards personal estate, be entitled to probate, if made according to the forms required either by the law of the place where it was made, or by the law of the place where the testator was domiciled.¹⁰

§ 1063. In addition to those enactments in it which have been already mentioned, "The Wills Act, 1837," further provides, "that every will made by a man or woman shall be *revoked* by his or her *marriage*, except a will made in exercise of a power of appointment, when the real or personal estate thereby appointed would not, in default of such appointment, pass to his or her

¹ In re Saunders, 1865, L. R. 1 P. & D. 16.

² Id.

³ In re Admiral Austen, 1853, 3 Roberts. 611.

⁴ In re M'Murdo, 1867, L. R. 1 P. & D. 540 (Sir J. Wilde).

⁵ In re Patterson, 1898, 79 L. T. 123 (Gorell Barnes, J.). See, also, In re Rae, 1891, 27 L. R. Ir. 116.

⁶ *Ld. Euston v. Ld. H. Seymour*, 1802, cited 2 Curt. 339, and recognised in *Drummond v. Parish*, 1843, 1 Roberts. 276.

⁷ In re Tweedale, 1874, L. R. 3

P. & D. 204.

⁸ *Croker v. M. of Hertford*, 1844, 4 Moo. P. C. C. 339.

⁹ 24 & 25 V. c. 114.

¹⁰ The Act only applies to such persons: In goods of Keller, 1891, 61 L. J. P. 39. It will not apply to a testamentary exercise of a power; *Re Kirwan's Trusts*, 1883, 25 Ch. D. 373. Nor to a person who, though his domicile of origin was English, was at his death domiciled in Germany, leaving a will in English form: *Bloxam v. Favre*, 1884, 8 P. D. 101 (C. A.).

heir, customary heir, executor, or administrator, or the person entitled, as his or her next of kin, under the Statute of Distributions;”¹ and “that no will shall be revoked by any presumption of an intention, on the ground of an alteration in circumstances;”² and “that no will, or codicil,³ or any part thereof, shall be revoked otherwise than as aforesaid, or by another will or codicil executed in manner hereinbefore required,⁴ or by some writing declaring an intention to revoke the same,⁵ and executed in the manner in which a will is hereinbefore required to be executed, or by the burning, tearing, or otherwise destroying the same by the testator, or by some person in his presence, and by his direction, with the intention of revoking the same.”⁶ Where a testator had destroyed his will on the supposition that he had substituted another for it, but the latter instrument turned out to be invalid as not being duly executed, a copy of the first will was held to be entitled to probate.⁷ With respect to the *re-execution* of a will, in which alterations have been made, it cannot be too well understood that a tracing by a testator with a dry pen over his former signature in the presence of witnesses cannot be regarded as equivalent to a re-signature.⁸

§ 1064. To revoke a former will by a later one, no revocation clause is absolutely necessary; but any paper duly executed, by which the testator disposes of his *whole* property, is,—except under very special circumstances,⁹—a revocation in toto of all

§§ 1063,
1064.

¹ 7 W. 4 & 1 V. c. 26, § 18. See *In re Sir C. Fitzroy*, 1858, 1 S. & T. 133; *Re M'Vicar*, 1869, L. R. 1 P. & D. 671.

² § 19. Or by any change of domicile, 24 & 25 V. c. 114 (“The Wills Act, 1861”), § 3.

³ *In re Turner*, 1872, L. R. 2 P. & D. 403. See ante, § 165.

⁴ Ante, § 1050.

⁵ *De Pontès v. Kendall*, 1862, 31 L. J. Ch. 185. See *In re Hicks*, 1869, L. R. 1 P. & D. 683; *In re Fraser*, 1869, L. R. 2 P. & D. 40; *In re Durance*, 1872, L. R. 2 P. & D. 406. A verbal authority, given by a Hindu testator to another person to destroy his will, will revoke the instrument, even though it be not destroyed: *Maharajah Pertab Narain*

Singh v. Maharanee Subhao Koer, 1877, L. R. 4 Ind. App. 228 (P. C.).

⁶ § 20. See *Mills v. Milward*, 1890, 15 P. D. 20.

⁷ *Scott v. Scott*, 1859, 1 S. & T. 258; *Clarkson v. Clarkson*, 1862, 31 L. J. P. & M. 143; *Giles v. Warren*, 1872, L. R. 2 P. & D. 401; *Dancer v. Crabb*, 1873, L. R. 3 P. & D. 98; *Powell v. Powell*, 1866, L. R. 1 P. & D. 209; overruling *Dickinson v. Swatman*, 1861, 30 L. J. P. & M. 84. See *Eckersley v. Platt*, 1866, L. R. 1 P. & D. 281; *Re Weston*, 1869, L. R. 1 P. & D. 633; and post, § 1070.

⁸ *In re Cunningham*, 1860, 29 L. J. P. & M. 71.

⁹ See *O'Leary v. Douglass*, 1878, 1 L. R. Ir. 45.

§ 1064. previous wills. This doctrine is applicable, even where the last testamentary paper contains no appointment of executors.¹ Indeed, in one case where a testator by his "*last will*," in which executors were appointed, disposed of *part* of his personalty, a former will was held to be revoked, though it contained provisions not wholly inconsistent with the later instrument.² The onus of establishing revocation lies, however, on the party who impeaches the first will; and no inference in his favour can be drawn from the mere fact that the later instrument contains equivocal expressions, or that the legacies bequeathed by it are *partially* inconsistent with prior testamentary dispositions.³ Still, if two documents taken together would dispose of property far larger than that possessed by the testator, that fact in itself raises a fair inference that the first was intended to be revoked by the second;⁴ and, indeed, in every inquiry of this nature, if any real ambiguity can be shown to exist respecting the testator's intentions, recourse may be had to parol evidence to clear up the doubt.⁵

¹ Henfrey v. Henfrey, 1842, 2 Curt. 468 (P. C.).

² Plenty v. West, 1845, 1 Roberts. 24. See, also, S. C. in Ch. 1853. Little, if any, weight, however, can now be attached to this decision. For, in the first place, it appears clear that the phrase "*last will*" will simply be regarded as one of form. (Stoddart v. Grant, 1851-2, 1 Macq. 171 (H. L.) (Ld. Truro); Freeman v. Freeman, 1854, 23 L. J. Ch. 838.) And in the next place, according to a maxim which has received the solemn sanction of the Court of last resort, a former will cannot be revoked by one of later date, unless the later instrument contains a clause of express revocation, or unless the two wills are incapable of standing together. (Stoddart v. Grant, 1851-2, 1 Macq. 171 (H. L.). See Williams v. Williams, 1877, 8 Ch. D. 789, C. A.; In re Graham, 1863, 32 L. J. P. & M. 113; Dempsey v. Lawson, 1877, L. R. 2 P. D. 98; Shiel v. O'Brien, 1872, Ir. R. 7 Eq. 64; Leslie v. Leslie, 1872, Ir. R. 6 Eq. 332; Lemage v. Goodban, 1865, L. R. 1 P. & D. 57; In re Fenwick, 1867, L. R. 1 P.

& D. 319; Greaves v. Price, 1863, 32 L. J. P. & M. 113; Birks v. Birks, 1865, 34 L. J. P. & M. 90; In re Petchell, 1874, 43 L. J. P. & M. 22; Re Macfarlane, 1884, 13 L. R. Ir. 264.)

³ Stoddart v. Grant, 1851-2, 1 Macq. 171 (H. L.). See, also, Doe d. Hearle v. Hicks, 1831-2, 9 Dowl. & R. 15 (H. L.); Wallace v. Seymour, 1871, Ir. R. 6 C. L. 196, 219, 343; Doe v. Ward, 1852, 21 L. J. Q. B. 145; Williams v. Evans, 1853, 27 L. J. Ex. 176; Freeman v. Freeman, 1854, 23 L. J. Ch. 838; Barclay v. Maskelyne, 1859, 28 L. J. Ch. 115; Robertson v. Powell, 1864, 33 L. J. Ex. 34; Pileworth v. Mosse, 1862, 14 Ir. Ch. R. 163.

⁴ Jenner v. Finch, 1879, 5 P. D. 106 (Sir J. Hannen).

⁵ Id. Allen v. Maddock, 1858, 11 Moore P. C. Rep. 477, per Lord Kingsdown; Doe d. Shallcross v. Palmer and Others, 1851, 16 Q. B. 747; Dench v. Dench, 1877, 2 P. D. 64; Horsford, re, 1874, L. R. 3 P. & D. 211; Sugden v. Lord St. Leonards, 1876, 1 P. D. 154; Gould v. Lake, 1880, 6 P. D. 1.

§ 1065. Where a second will, which was not produced, contained a different disposition of real estate from a former one, "but in what particulars is unknown," the House of Lords, on writ of error, decided that the first will was not revoked, so as to let in the title of the heir-at-law ;¹ and in another case in which the contents of the second will were utterly unknown, save that it commenced with the words "This is the last will and testament," the Judicial Committee of the Privy Council held that the prior will remained unrevoked.² A general clause in a will revoking all former wills does not of itself necessarily operate to revoke a will made in execution of a power ;³ though it will be held to have that effect, unless such a result can be shown to be utterly unreasonable.⁴ It seems that the re-execution of a will, containing a clause of revocation, will not in general be deemed to have revoked any of its codicils ; for, unless the contrary appears to have been the intention of the testator, the Court will hold, that all the codicils have been republished by the re-execution of the principal instrument.⁵

§§ 1065—
1067.

§ 1066. With respect to the revocation of a will by its destruction, it should be observed that a testator cannot revoke his will by authorising any person to destroy it *out of his presence* ; and it follows as a corollary from this proposition, that he has no power to make his will contingent, by giving authority even by the will itself to any person to destroy it after his death.⁶

§ 1067. It is difficult to fix *a priori* what extent of *burning* or *tearing* will amount to the revocation of a will. It is clear that the revocation will not be complete, unless the act of spoliation be deliberately done upon the instrument, in the belief that it is a valid will,⁷ and *animo revocandi*.⁸ This is expressly rendered

¹ Goodright v. Harwood, 1774-5, 3 Wils. 497 (H. L.). See Thomas v. Evans, 1802, 2 East, 488 ; Brown v. Brown, 1858, 8 E. & B. 876 ; Dickinson v. Stidolph, 1861, 11 C. B. N. S. 341, 357 ; In re Brown, 1858, 1 S. & T. 32.

² Cutto v. Gilbert, 1854, 9 Moo. P. C. C. 143.

³ In re Merritt, 1858, 1 S. & T. 112.

⁴ Sotheran v. Denning, 1881, 20

Ch. D. 99 (C. A.).

⁵ Wade v. Nazer, 1848, 6 Notes of Cases, Ecc. & Mar. 46. See In re De la Saussaye, 1873, L. R. 3 P. & D. 42.

⁶ Stockwell v. Ritherdon, 1848, 6 Notes of Cases, Ecc. & Mar. 409.

⁷ Giles v. Warren, 1872, L. R. 2 P. & D. 401.

⁸ See In re Cockayne, 1856, Deane, Ecc. R. 177.

§§ 1067,
1068.

necessary by the Wills Act,¹ and was impliedly required by the statute of Charles.² It is further clear that the burthen of showing that a once valid will has been revoked by mutilation, will lie upon the party who sets up the revocation of the instrument.³ There may, moreover, be a partial revocation.⁴ Moreover, it seems plain, on general principle, that the declarations of the testator, accompanying the act of spoliation,—unlike those which he may subsequently make,⁵—will be admissible in evidence as explanatory of his intention.⁶ Still the question remains, Must there be a total or substantial burning or tearing of the writing itself, or will the revocation be complete, if the testator, intending to revoke, tears or burns a portion of the paper on which the will is written, but does not destroy or deface any part of the writing?⁷ Where a testator, being angry with the devisee, began to tear his will, and had actually torn it into four pieces before he was pacified; but afterwards *himself* fitted the several pieces together, and put them by, saying he was glad it was no worse; the Court refused to disturb a verdict by which the jury had found *that the act of cancellation was incomplete*.⁸

§ 1068. Such acts as the *cutting* out his signature by a testator, or tearing off the *seal* from a will, needlessly executed as a sealed instrument, have been deemed sufficient, both in England and in America, to destroy the will in its entirety, and to effect its revocation,⁹ if not by force of the word “tearing,” at least as

¹ Ante, § 1063.

² *Bibb v. Thomas*, 1776-7, 2 W. Bl. 1044.

³ *Harris v. Berrall*, 1858, 1 S. & T. 153; *Benson v. Benson*, 1870, L. R. 2 P. & D. 172; In goods of Taylor, 1890, 63 L. T. 230.

⁴ In goods of Leach, 1890, 63 L. T. 191; *Brooke v. Kent*, 1840, 3 Moore P. C. 341.

⁵ *Staines v. Stewart*, 1862, 31 L. J. P. & M. 10. But see *Cheese v. Lovejoy*, 1877, L. R. 2 P. & D. 161 (C. A.).

⁶ *Dan v. Brown*, 1825, 4 Cowen, 490 (Am.); *Clarke v. Scripps*, 1852, 2 Roberts. 568; *Re Horsford*, 1874, L. R. 3 P. & D. pp. 214—216; *Doe d. Shallcross v. Palmer*, 1851, 16 Q. B. 747; *Dench v. Dench*, 1877, 2 P. D. 64.

⁷ See *Doe v. Harris*, 1837, 6 A. & E. 215.

⁸ *Doe v. Perkes*, 1820, 3 B. & Ald. 489. It will be observed that this case proceeded on the ground that the cancellation was incomplete. But in an older case of *Bibb v. Thomas*, 1776-7, 2 W. Bl. 1043, where a testator, having given the will “something of a rip with his hands, and having torn it so as almost to tear a bit off,” rumpled it up and threw it into the fire, *but a bystander saved it without his knowledge*, before, as it seems, it was at all burnt, the revocation was held complete. This last-mentioned case has, however, been doubted. See *Doe v. Harris*, 1837, 6 A. & E. 215.

⁹ *Price v. Powell*, 1858, 27 L. J. Ex. 409; *Avery v. Pixley*, 1808, 4

being a manner of "otherwise destroying the same."¹ Where, however, a will was found in a mutilated state, being both torn and cut, but the signatures of the testator and of the attesting witnesses remained uninjured, the Court, guided by the peculiar nature of the mutilations, and, in the absence of any extrinsic evidence, held the instrument not to be revoked.²

§§ 1068,
1069.

§ 1069. The Provisions of the Statute of Frauds which related to wills, made "*cancelling*" one of the modes of revoking a will.³ But it is enacted by "The Wills Act, 1837,"⁴ "that no obliteration, or interlineation, or other alteration made in any will after the execution thereof, shall be valid or have any effect, except so far as the words or effect of the will before such alteration shall not be *apparent*, unless such alteration shall be executed in like manner as hereinbefore is required for the execution of the will;⁵ but the will, with such alteration as part thereof, shall be deemed to be duly executed, if the signature of the testator and the subscription of the witnesses be made in the margin, or on some other part of the will, opposite or near to such alteration,⁶ or at the foot or end of, or opposite to, a memorandum referring to such alteration, and written at the end⁷ or some other part of the will." The word "*apparent*" here used, simply applies to what is apparent to ordinary eyesight on the face of the instrument, and does not mean what is capable of being made apparent by extrinsic evidence. Consequently, if a testator, *animo revocandi*, entirely obliterates any part of the will, so that such part of the original will is no longer apparent to ordinary eyesight, this operates as a revocation of that part, and no evidence dehors the will can be received, in order to show how the defaced passage originally stood.⁸ For example, where a testator had

Mass. 462 (Am.). See, also, Williams v. Tyley, 1858, Johns. 530; In re Harris, 1864, 33 L. J. P. & M. 181.

¹ Hobbs v. Knight, 1838, 1 Curt. 768; Evans v. Dallow, 1862, 31 L. J. P. 128. See ante, § 165.

² Clarke v. Scripps, 1852, 2 Roberts. 568; In re Woodward, 1871, L. R. 2 P. & D. 206; In re Wheeler, 1880, 49 L. J. P. D. & A. 29.

³ § 4. See In re Brewster, 1860, 33 L. J. P. 124; Cheese v. Lovejoy,

1877, 2 P. D. 161 (C. A.).

⁴ § 21.

⁵ See ante, § 1050. See, also, In goods of Shearn, 1880, 50 L. J. P. 15.

⁶ In re Wilkinson, 1881, 6 P. D. 100.

⁷ See In re Treeby, 1875, L. R. 3 P. & D. 242.

⁸ Townley v. Watson, 1844, 3 Curt. 761; In re McCabe, 1873, L. R. 3 P. & D. 94.

**§§ 1069,
1070.**

covered a bequest in his will by pasting a piece of paper over it, which rendered the original bequest no longer apparent (or visible to ordinary eyesight) on the face of the will, the Court declined to order the removal of the paper, and granted probate of the will with the part which was then not "apparent" left in blank.¹ Again, the erasure by a testator of his own signature, or of the signature of either or both of the witnesses, if done *animo revocandi*, amounts to a revocation of the whole will, and is in fact tantamount to its actual destruction.² It has already been shown³ that, in the absence of any direct evidence, it will be presumed that any alteration or erasure in a will was made after its execution, and probate of the will in its original form will consequently be granted.⁴

§ 1070. The provisions of "The Wills Act, 1837," as to the revocation or alteration of wills, notwithstanding § 34,⁵ apply equally to all wills, whether executed before or after the 1st of January, 1838, provided the act of assumed revocation has been done, or the alteration has been made, after that date.⁶ Although the section cited above⁷ does not expressly state that, to effect a revocation of the will or any part of it, the erasure or obliteration must be made with that *intention*, yet it is held that (as under the Statute of Frauds) the *animus revocandi* is indispensable; consequently where a testator had erased the amount of a legacy, and had inserted a smaller sum, but the alteration took no effect, as it had not been duly executed, probate of the will in its original form was decreed, since it was clear that the testator intended only a *substitution*, and not a revocation, of the bequests altered.⁸

¹ *Re Horsford*, 1874, L. R. 3 P. & D. 211. As to what happened when some twenty years later it was discovered that the words which had been written beneath the paper had become visible to the ordinary eyesight of a careful observer, they were admitted to probate, see post, § 1071.

² *Hobbs v. Knight*, 1838, 1 Curt. 768; *Evans v. Dallow*, 1862, 31 L. J. P. 128. See, also, *In re Harris*, 1864, 33 L. J. P. & M. 181.

³ "Presumptions," ante, § 164.

⁴ *Cooper v. Bockett*, 1844-6, 4 Moo. P. C. C. 419; *Greville v. Tylee*,

1851, 7 Moo. P. C. C. 320.)

⁵ See ante, § 1050.

⁶ *Hobbs v. Knight*, 1838, 1 Curt. 768; *Countess de Zichy Ferraris v. M. of Hertford*, 1843, 3 Curt. 468; *Brooke v. Kent*, 1840, 3 Moo. P. C. C. 334; *Croker v. M. of Hertford*, 1844, 4 Moo. P. C. C. 339; *Andrews v. Turner*, 1842, 3 Q. B. 177.

⁷ § 21, cited ante, § 1069.

⁸ *Brooke v. Kent*, 1840, 3 Moo. P. C. C. 334; *Burtenshaw v. Gilbert*, 1774, 1 Cowp. 52 (Ld. Mansfield); *Onions v. Tyrer*, 1716, 1 P. Wms. 343; *In re Nelson*, 1872, Ir. R. 6

The testator was, in short, considered to have intended a complex act, viz., to undo a previous gift, for the purpose of making another gift in its place. The latter branch of his intention was not effected, and, consequently, no sufficient reason existed for believing that he meant to vary the former gift at all,¹ and the erasure was treated as an act done by mere mistake, *sine animo cancellandi*.²

§§ 1070—
1072.

§ 1071. When this doctrine of dependent relative revocation arises, the Court has recourse to any legal proof by which it can ascertain the disposition of the testator. Therefore, in the case already mentioned, in which a testator, to vary the amount of a legacy, had pasted a piece of paper over the sum bequeathed, on which he had written a substituted amount (which not being duly attested could not be taken as part of the will), the Court, when (though this was some years after probate of the rest of the will had been granted) it found that the original legacy could be read by the unassisted eyesight, gave effect to the will as originally framed, and admitted to probate the words which³ had originally been omitted in the probate.⁴

§ 1072. "The Wills Act, 1837," enacts, that "no will or codicil, or any part thereof, which shall be in any manner revoked, shall be revived otherwise⁵ than by the re-execution thereof, or by a codicil executed in manner hereinbefore required, and showing an intention to revive the same;⁶ and when any will or codicil, which shall be partly revoked, and afterwards wholly revoked, shall be revived, such revival shall not extend to so much thereof as shall have been revoked before the revocation of the whole thereof, unless an intention to the contrary shall be

Eq. 569; *In re Cockayne*, 1856, Deane Ecc. R. 177; *In re Parr*, 1860, 29 L. J. P. & M. 70; *In re Harris*, 1860, 29 L. J. P. & M. 79; *In re Middleton*, 1865, 34 L. J. P. & M. 16; *In re McCabe*, 1873, L. R. 3 P. & D. 94.

¹ See *Rawlins v. Rickards*, 1860, 28 Beav. 370; *Ibbott v. Bell*, 1865, 34 Beav. 395; *Quinn v. Butler*, 1868, L. R. 6 Eq. 225.

² *Locke v. James*, 1843, 13 L. J. Ex. 186. See *Tupper v. Tupper*, 1855, 1 K. & J. 665; and ante,

§ 1063, ad fin.

³ See § 1069.

⁴ *Ffinch v. Combe*, 1894, P. 191. See ante, § 1069.

⁵ See ante, § 165.

⁶ See *In re Harper*, 1849, 7 Notes of Cases, Ecc. & Mar. 44; *Marsh v. Marsh*, 1861, 30 L. J. P. & M. 77; *Rogers v. Goodenough*, 1862, 31 L. J. P. & M. 49; *In re May*, 1868, 37 L. J. P. & M. 68; *In re Steele, May & Wilson*, 1868, L. R. 1 P. & D. 575; *In re Reynolds*, 1873, L. R. 3 P. & D. 35.

**§§ 1072,
1073.**

shown.”¹ In consequence of this enactment, a conditional will, which has become invalid in consequence of the condition not having been performed, cannot now be established by any evidence of “adherence”;² neither can the will of a married woman, which was originally void because it was made without her husband’s consent, be set up by any parol recognition made by her subsequently to the husband’s death.³ Again, the destruction of the revoking instrument is no longer sufficient to revive a former will;⁴ and the question of revival or non-revival from this cause,—which under the old system was a fruitful source of litigation,⁵—can never again arise.⁶

§ 1073. It is next necessary to refer to the statute generally known as Lord Tenterden’s Act.⁷ The first section of this Act has already been set out and partially discussed in the Chapter *On Admissions*.⁸ It must be read as amended by the Mercantile Law Amendment Act, 1856.⁹ When so read its provisions are that in actions grounded on simple contract, no case shall be taken out of the Statute of Limitations, except by *acknowledgment* or *promise in writing to be signed by the party chargeable thereby*, or by his authorised agent, or by part payment.¹⁰ The question whether the language employed in each particular case is or is not sufficient to take a case out of the statute is a question for the Court.¹¹ But having regard to the endless variety of language which may be used, it is obviously impossible to lay down

¹ 7 W. 4 & 1 V. c. 26, § 22. See *Andrews v. Turner*, 1842, 3 Q. B. 177.

² *Roberts v. Roberts*, 1862, 31 L. J. P. & M. 46.

³ *Id.* (Sir C. Cresswell). See, also, *Willock v. Noble*, 1875, L. R. 7 H. L. 580.

⁴ *Major v. Williams*, 1843, 3 Curt. 432; *Brown v. Brown*, 1858, 8 E. & B. 876; *In re Brown*, 1858, 27 L. J. P. & M. 20; *Wood v. Wood*, 1867, L. R. 1 P. & D. 309.

⁵ This question, under the old system, depended on the intention of the testator, as gathered from the circumstances of each particular case. *James v. Cohen*, 1844, 3 Curt. 782, citing *Usticke v. Bawden*, 1824, 2 Add. 125.

⁶ Except in the very improbable event of a still earlier will having been revoked by a will made before 1st January, 1838, which second will has itself been revoked in some valid manner.

⁷ 9 G. 4, c. 14.

⁸ Ante, § 744. See, also, § 600.

⁹ 19 & 20 V. c. 97, § 13, cited ante, § 745.

¹⁰ The law is the same in Ireland; 16 & 17 V. c. 113, § 24, as amended by 19 & 20 V. c. 97, § 13. See *Archer v. Leonard*, 1863, 15 Ir. Ch. R. 267; *Leland v. Murphy*, 1865, 16 Ir. Ch. R. 500.

¹¹ That this is a question for the Court, and not for the jury, see ante, § 43.

distinct rules of interpretation, by following which a sound decision may be arrived at in every instance. The following ten general principles appear, however, to have been established:— §§ 1073—1074a.

§ 1074. First, the Act contains nothing to alter the legal construction of acknowledgments or promises made by defendants. It merely requires a different mode of proof, and substitutes the certain evidence of a writing signed by the party chargeable for the insecure and precarious testimony to be derived from the memory of witnesses.¹ Every inquiry, therefore, whether a written document amounts to an acknowledgment or promise, is no other than whether the same words, if proved before the statute to have been spoken by the defendant, would have had a similar operation.²

§ 1074A. Secondly, to take a case out of the operation of the statute, the written and signed acknowledgment must amount either to an express promise to pay the debt, or to a clear and *unqualified* admission of a still subsisting liability, from which a promise to pay *on request* will be implied by law.³ The insertion, therefore, of a debt in the statement of assets and debts, made under the bankrupt law by a debtor whose affairs are in course of arrangement, is not a sufficient acknowledgment, as it simply amounts to an admission of a debt, which is to be paid in part or in some qualified mode.⁴

¹ See *Spollan v. Magan*, 1851, 1 Ir. C. L. R. 700 (Monahan, C.J.)

² *Haydon v. Williams*, 1830, 7 Bing. 166.

³ *Morrell v. Frith*, 1838, 7 L. J. Ex. 172; *Bucket v. Church*, 1840, 9 C. & P. 212 (id.); *Tanner v. Smart*, 1827, 6 B. & C. 609; *Smith v. Thorne*, 1852, 21 L. J. Q. B. 199; *Everett v. Robertson*, 1859, 28 L. J. Q. B. 23; *Francis v. Hawkesley*, 1859, 28 L. J. Q. B. 370; *Goute v. Goate*, 1856, 1 H. & N. 29; *Brigstocke v. Smith*, 1833, 2 L. J. Ex. 187; *Hart v. Prendergast*, 1845, 15 L. J. Ex. 223; where *Alderson, B.*, questioned *Gardner v. M'Mahon*, 1842, 11 L. J. Q. B. 297. In *Prance v. Simpson*, 1854, Kay, 678, the statute was held to be ousted by a written acknowledgment that an account was pending coupled with a

promise to pay the balance, if any should be found due from the writer (*Wood, V.-C.*). See *Hughes v. Paramore*, 1855, 24 L. J. Ch. 681; *Crawford v. Crawford*, 1867, Ir. R. 2 Eq. 166; In re *River Steamer Co.*, *Mitchell's claim*, 1871, L. R. 6 Ch. 822.

⁴ See *Ex parte Topping, Re Levey and Robson*, 1865, 34 L. J. Bk. 44 (Lord Cranworth, C.). On the other hand, letters have been held to be *unqualified admissions* of a debt, and to take the case out of the operation of the statute, when they, in substance, contained such expressions as the following:—"I can never be happy till I have paid you; your account is correct, and would that I were now going to inclose the amount" (*Dodson v. Mackey*, 1834, 4 N. & M. 327);—"I wish I could

§ 1074b. § 1074b. Thirdly, a *conditional promise*, in the absence of proof of the fulfilment of the condition, will not suffice; but if such

comply with your request, for I am anxious to pay your bill. I hope that out of the present harvest it will be paid; if not, the concern must be broken up to meet it" (*Bird v. Gammon*, 1837, 5 Scott, 213; *Martin v. Geoghegan*, 1850, 13 Ir. L. R. 403);—"I am in your debt, and will not avail myself of the statute; but we do not agree as to the amount, and until this be ascertained, I cannot move a step towards giving you satisfaction, and doing justice to my other creditors" (*Gardner v. M'Mahon*, 1842, 11 L. J. Q. B. 297; questioned (*Alderson, B.*) in *Hart v. Prendergast*, 1845, 15 L. J. Ex. 223. See *Leland v. Murphy*, 1865, 16 Ir. Ch. R. 500; *Crawford v. Crawford*, 1867, Ir. R. 2 Eq. 166; *Burrows v. Baker*, 1869, Ir. R. 3 Eq. 596; *Bewley v. Power*, 1833, *Hayes & J.* 368; and *Prance v. Symson*, 1854, *Kay*, 678, cited ante, § 1074. n.);—"I will pay you your debt by instalments, but I demur to pay the interest" (*Shah Mukhun Lall v. Nawab Imtiazood Dowlah*, 1865, 10 Moore, Ind. App. C. 362 (P. C.). See *Wilby v. Elgee*, 1875, L. R. 10 C. P. 497);—"Your bill does not sufficiently specify the work done, and I shall feel obliged if you will more particularly explain it. I will settle your account immediately; but being at a distance, I want everything explicit. Tell H. to send me the agreements, and I will return them by the first post with instructions to pay, if correct" (*Sidwell v. Mason*, 1857, 26 L. J. Ex. 407; *Godwin v. Culley*, 1859, 4 H. & N. 373);—"The old account between us which has been standing over so long has not escaped our memory, and as soon as we can get our affairs arranged we will see you are paid; perhaps, in the meantime, you will let your clerk send me an account of how it stands" (*Chasemore v. Turner*, 1875, L. R. 10 Q. B. 500; but see *Green v. Humphreys*, 1884, 26 Ch. D. 474 (C. A.));—"I shall be obliged to you to send in your account, and can give no further orders till this be done" (*Quincey v.*

Sharpe, 1876, 1 Ex. D. 72);—"If you send me the particulars of your account with vouchers, I will examine it and send cheque. But the amount cannot be anything like the amount you now claim" (*Skeet v. Lindsay*, 1877, 2 Ex. D. 314);—"I am ashamed your account has stood so long; I must trespass on your kindness a little longer, till a turn in trade takes place" (*Cornforth v. Smithard*, 1859, 29 L. J. Ex. 228; *Lee v. Wilmot*, 1866, L. R. 1 Ex. 364);—"Your demand is not just; I am not in your debt anything like 90l.; I will settle the difference when we meet" (*Colledge v. Horn*, 1825, 3 Bing. 119; *Edmonds v. Goater*, 1852, 21 L. J. Ch. 290);—"I have received your letter," [which stated that some items in the bill sent with it were of more than six years' standing]; "P. will attend for me to tax your costs, and one will then know what to pay, the other what to receive" (*Murphy v. Meredith*, 1842, 5 Ir. L. R. 120, holding the above was *not* a conditional acknowledgment, on which the plaintiff could only recover on proof of taxation of cost. See *Archer v. Leonard*, 1863, 15 Ir. Ch. R. 267);—"I send you my account, leaving a blank for your counter-demand on me, and beg that you will favour me with the balance" (*Waller v. Lacy*, 1840, 9 L. J. C. P. 217; *Williams v. Griffith*, 1849, 18 L. J. Ex. 210);—"I will at any time pay my proportion of the joint debt" (*Lechmere v. Fletcher*, 1833, 1 C. & M. 623);—"I cannot comply with your request yet; the best way for you will be to send me the bill you hold, and draw another for 30l., the balance of your money" (*Dabbe v. Humphries*, 1834, 10 Bing. 446). Letters disputing the amount but promising to pay what may in fact be due upon an account being taken (*Langrish v. Watts*, 1903, 1 K. B. 636). See, also, *Evans v. Simon*, 1853, 23 L. J. Ex. 16; *Collis v. Stack*, 1857, 26 L. J. Ex. 138. The older authorities are not here referred to, as few of them are law. They

proof be afforded, the promise, whether express or implied, will be converted into an absolute one, and as such will support a statement of claim, averring a promise to pay on request.¹ In the case of a conditional promise the statute begins to run, not

§ 1074b.

are noticed in 2 St. Ev. 662—667. Letters, in substance as follows, have been held *not* to take the case out of the operation of the statute, as only amounting to *qualified acknowledgment*:—"I intend to pay A.'s claim if allowed time; if I am proceeded against, any exertion of mine will be rendered abortive" (*Fearn v. Lewis*, 1830, 6 Bing. 349);—"I have been expecting to be able to give a satisfactory reply to your application respecting B.'s demand against me. I will call upon you to-morrow on the matter" (*Morrell v. Frith*, 1838, 7 L. J. Ex. 172; *Hamilton v. Terry*, 1852, 21 L. J. C. P. 132; *Cawley v. Furnell*, 1852, 20 L. J. C. P. 197);—"I will have nothing to do with your claim; you can make me a bankrupt, but I had rather go to gaol than pay you" (*Linsell v. Bonsor*, 1835, 2 Bing. N. C. 241);—"I owe the money, but I will never pay it" (*A'Court v. Cross*, 1825, 3 Bing. 329);—"I am sure my account was settled; but as you say it was not, I will pay you 10*l.* a year, if you like to accept that sum" (*Buckmaster v. Russell*, 1861, 10 C. B. (N.S.) 745);—"If in funds I would immediately pay the money, and take the bill of exchange out of your hands" (*Richardson v. Barry*, 1860, 29 Beav. 22);—"I admit as executor your claim on the estate, and think it just, but I am compelled to refuse payment as the legatees object" (*Briggs v. Wilson*, 1854, 5 De G. M. & G. 12);—"I will not fail to meet you on fair terms, and hope, within perhaps a week, to be able to pay you at all events a portion of the debt, when we shall settle about the liquidation of the balance" (*Hart v. Prendergast*, 1845, 15 L. J. Ex. 223; *Smith v. Thorne*, 1852, 21 L. J. Q. B. 199; *Rackham v. Marriott*, 1857, 26 L. J. Ex. 315);—"I send you an account of some debts due to me; collect them, and pay yourself, and you and I shall then be clear" (*Routledge v.*

Ramsay, 1838, 7 L. J. Q. B. 156);—"Arrangements have been made to enable me to discharge your debt; funds have been appointed for that purpose, of which A. is trustee, and to him I refer you for further information" (*Whippy v. Hillary*, 1832, 3 B. & Ad. 399; overruling *Baillie v. I.d. Inchiquin*, 1796, 1 Esp. 435, as the Court admitted in *Routledge v. Ramsay*, 1838, 29 L. J. M. C. 90);—"Send me in any demand you have to make on me, and, *if just*, I shall not give you the trouble of going to law" (*Spong v. Wright*, 1842, 12 L. J. Ex. 144. See *Collinson v. Margesson*, 1858, 27 L. J. Ex. 305; *Cassidy v. Firman*, 1867, Ir. R. 1 C. L. 8);—"I will not pay your demand, for it is of more than six years' standing" (*Brigstocke v. Smith*, 1832, 2 L. J. Ex. 187; *Coltman v. Marsh*, 1811, 3 Taunt. 380);—"I have sent you a note for the money I owe you," the note so sent being inadmissible in evidence for want of a proper stamp (*Parmiter v. Parmiter*, 1860, 30 L. J. Ch. 508).

¹ *Humphreys v. Jones*, 1845, 14 L. J. Ex. 254; *Hart v. Prendergast*, 1845, 15 L. J. Ex. 223. The following *conditional acknowledgments* have been deemed insufficient, in the absence of proof that the conditions had respectively been fulfilled:—"I cannot pay the debt now, but I will as soon as I can" (*Tanner v. Smart*, 1827, 6 B. & C. 609; *Haydon v. Williams*, 1830, 7 Bing. 166; *Ayton v. Bolt*, 1827, 4 Bing. 105; *Gould v. Shirley*, 1829, 2 Moo. & P. 581);—"We are waiting a remittance from Liverpool against beef we want to sell; when it comes, we shall send you the amount of the bill" (*Hodgens v. Graham*, 1831, Alc. & Nap. 49 (Ir.));—"I shall be most happy to pay you principal and interest as soon as convenient" (*Edmunds v. Downes*, 1834, 3 L. J. Ex. 98; *Meyerhoff v. Froehlich*, 1878, 48 L. J. C. P. 39 (C.A.)).

§§ 1074b from the date of the promise, but from the time when the
—1075b. condition is fulfilled.

§ 1075. Fourthly, since a mere acknowledgment of a debt, which does not amount in law to an implied promise to pay, will not take a case out of the Statute of Limitations, an admission to a *stranger* that a sum is due will not suffice.³ Consequently, an acknowledgment by the maker of a promissory note to the payee, of the existence of a debt due thereon, cannot be made available by a subsequent holder of the note to defeat the Statute of Limitations.³

§ 1075A. Fifthly, a general written promise to pay, not specifying either any amount, or containing any absolute admission of *some* debt being due, is sufficient, and the amount may be ascertained by extrinsic evidence; but if no proof be given on this head, the plaintiff will be entitled merely to nominal damages.⁴

§ 1075B. Sixthly, the promise or acknowledgment in writing need not specify either the person to whom, or the time when, it was made, but both these points may be established by parol evidence;⁵ nor need the whole terms of the promise appear upon

¹ *Waters v. E. of Thanet*, 1842, 2 Q. B. 757; *Maunsell v. Hedges*, 1851, 2 Ir. C. L. R. 88; *Hammond v. Smith*, 1864, 33 Beav. 452.

² *Stamford, &c. Bank v. Smith*, [1892] 1 Q. B. 765 (C. A.); *Grenfell v. Girdlestone*, 1837, 2 Y. & C. Ex. 676; *Godwin v. Culley*, 1859, 4 H. & N. 373; *Fuller v. Redman*, 1859, 29 L. J. Ch. 324; *In re Hindmarsh*, 1860, 1 Drew. & Sm. 129; *Bush v. Martin*, 1863, 33 L. J. Ex. 17. Older authorities, throwing doubt on the proposition in the text, are to be found in *Clark v. Hooper*, 1834, 3 L. J. C. P. 159; *Eicke v. Nokes*, 1834, M. & M. 303; *Peters v. Brown*, 1801, 4 Esp. 46; *Smith v. Poole*, 1841, 10 L. J. Ch. 192; *Spollan v. Magan*, 1851, 1 Ir. C. L. R. 700; *McCarthy v. O'Brien*, 1839, 2 Ir. L. R. 67; *Morrogh v. Power*, 1842, 5 Ir. L. R. 494. See, also, post, § 1091.

³ *Stamford, &c. Bank v. Smith*, supra; *Cripps v. Davis*, 1843, 13 L. J. Ex. 217; *Mountstephen v. Brooke*, 1819, 1 Chitty, R. 390. In *Bourdin v. Greenwood*, 1872, L. R.

13 Eq. 281 (*Wickens, V.-C.*), the maker of a promissory note bearing date January, 1846, was in 1866 pressed for payment, whereupon he altered the date by converting the 4 of 1846 into a 6, indorsed his name as follows: "W. H. Langley, 1866," and then returned the note to the holder. In a creditor's suit, the V.-Ch. held that the indorsement was a sufficient acknowledgment to bar the statute, and that the note, notwithstanding the alteration of the date, was still a valid document. Sed qy.

⁴ *Spong v. Wright*, 1842, 12 L. J. Ex. 144; *Lechmere v. Fletcher*, 1833, 1 C. & M. 623; *Cheslyn v. Dalby*, 1840, 4 Y. & C. Ex. R. 238; *Waller v. Lacy*, 1840, 9 L. J. C. P. 217; *Dickinson v. Hatfield*, 1831, 5 C. & P. 46; *Bewley v. Power*, 1833, *Hayes & J.* 368; and *Shickernell v. Hotham*, 1854, 1 Kay, 669; overruling the dicta in *Kennett v. Milbank*, 1831, 8 Bing. 38. See *Hartley v. Wharton*, 1840, 11 A. & E. 934, post, § 1091; and ante, § 1024.

⁵ *Hartley v. Wharton*, 1840, 11 A.

one document, but parol evidence is admissible to show that a letter was written in answer to a former one, in order to read the two letters together so that they may constitute a sufficient acknowledgment.¹

§ 1075c. Seventhly, even an infant, by giving a written acknowledgment of a debt due for *necessaries*, will take such debt out of the statute.²

§ 1075d. Eighthly, it matters not under this statute, any more than under the Statute of Frauds,³ to what part of the document the signature of the party making the acknowledgment is attached.⁴

§ 1075e. Ninthly, the promise, acknowledgment, or part-payment, must be made before action brought, since they severally bar the statute, not (as was formerly supposed) because they rebut the presumption of payment, but because they amount to a new promise.⁵

§ 1076-8. Tenthly, and lastly, the promise proved, whether express or implied, must correspond with that laid in the statement of claim :⁶ therefore, proof of an acknowledgment to or by an executor or administrator will not support an allegation of a promise to or by the testator or intestate.⁷

§ 1079. It will be remembered⁸ that a case may be taken out of the Statute of Limitations by a *part-payment*. For a payment to have the effect of doing this, it is not necessary that at the time of the payment the exact amount remaining due should be distinctly ascertained.⁹ Still, it must appear that the payment

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& E. 934; *Edmunds v. Downes*, 1834, 3 L. J. Ex. 98. See *Lobb v. Stanley*, 1844, 13 L. J. Q. B. 117.

¹ *McGuffie v. Burleigh*, 1898, 78 L. T. 264 (Bruce, J.).

² *Willins v. Smith*, 1854, 24 L. J. Q. B. 62. But see post, § 1084.

³ Ante, § 1028.

⁴ *Holmes v. Mackrell*, 1858, 3 C. B. N. S. 789.

⁵ *Bateman v. Pinder*, 1842, 3 Q. B. 574, overruling *Yea v. Fouraker*, 1760-1, 2 Burr. 1099.

⁶ *Tanner v. Smart*, 1827, 6 B. & C. 609 (Id. Tenterden); *Cripps v. Davis*, 1843, 13 L. J. Ex. 217.

⁷ *Sarell v. Wine*, 1803, 3 East, 409; *Browning v. Paris*, 1839, 8 L. J. Ex. 222; *Tanner v. Smart*, 1827, 6 B. & C. 609.

⁸ See § 1073, supra. The effect of a part payment is not affected by Lord Tenterden's Act, the reason for this being, it would appear, that a part payment is *an act* the meaning of which cannot be open to any reasonable doubt. See *Waters v. Tompkins*, 1835, 2 C. M. & R. 723; *Bodger v. Arch*, 1854, 24 L. J. Ex. 19.

⁹ *Walker v. Butler*, 1856, 25 L. J. Q. B. 377.

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was made, not only on account of a debt, but on account of the debt for which the action is brought. Therefore, if there be two undisputed but entirely separate debts, a part-payment within six years, not specifically appropriated, will not, as it seems, bar the statute as to either.¹ Moreover, it must appear that the payment was made in *part* discharge of the debt declared on; for the meaning of *part-payment* is not the naked fact of payment of a sum of money, but payment of a smaller *on account of a greater sum*, due from the person making the payment to him to whom it is made; which part-payment implies an admission of such greater sum being then due, and a promise to pay it.² The circumstances, too, must be such as to warrant the jury in inferring a promise to pay the remainder; and therefore, if part-payment be accompanied by a positive refusal to pay any more, it will not take the case out of the statute, though the debtor admits that the remainder is due.³ The payment, also, of a dividend under the Bankruptcy law,⁴ or the payment of interest in pursuance of a judgment obtained in a former action, to which the Statute of Limitations has been unsuccessfully pleaded,⁵ is open to the same objection.

§ 1080. The sale and delivery of goods will not take a case out of the Statute of Limitations, unless done under circumstances which would render the delivery equivalent to payment,⁶ as, for example, under an express agreement by the parties that goods delivered by the one should be taken by the other in part-payment of the debt.⁷ The statute would, in such a case, certainly be complied with, for the Legislature never intended that the

¹ *Burn v. Boulton*, 1846, 15 L. J. C. P. 97. But see *Walker v. Butler*, 1856, 25 L. J. Q. B. 377. See, also, *Nash v. Hodgson*, cited post, § 1081.

² *Tippets v. Heane*, 1834, 1 C. M. & R. 252; *Waters v. Tompkins*, 1835, 2 C. M. & R. 723; *Waugh v. Cope*, 1840, 6 M. & W. 824. See *Worthington v. Grimsditch*, 1845, 15 L. J. Q. B. 32.

³ *Wainman v. Kynman*, 1847, 16 L. J. Ex. 232.

⁴ *Ex parte Topping*, In re *Levey and Robson*, 1865, 34 L. J. Bk. 44; *Davies v. Edwards*, 1851, 21 L. J.

Ex. 4.

⁵ *Morgan v. Rowlands*, 1872, L. R. 7 Q. B. 493.

⁶ *Cottam v. Partridge*, 1842, 11 L. J. C. P. 161; overruling *Catlin v. Skoulding*, 1795, 6 T. R. 189; as only applicable previously to Lord Tenterden's Act. See, also, *Williams v. Griffiths*, 1835, 2 C. M. & R. 46.

⁷ *Hart v. Nash*, 1835, 2 C. M. & R. 337; *Hooper v. Stephens*, 1835, 4 A. & E. 71; *Blair v. Ormond*, 1851, 20 L. J. Q. B. 444. See *Hughes v. Paramore*, 1855, 24 L. J. Ch. 681.

"part-payment" should necessarily be in actual money, but it will suffice if it be made in any mode which the parties agree shall be treated as equivalent to a money payment.¹ And it has been urged that the sale and delivery of goods which, equally with the payment of money, are acts done, ought to be in general per se sufficient to exempt a debt from the operation of Lord Tenterden's Act; but however this may be in theory, the statute in fact contains no exception in favour of the sale or delivery of goods.

§ 1081. Neither, again, will the mere existence in an open account accrued of items which have arisen within six years, but in respect of which there has not been any actual payment in cash, or anything equivalent to it, take those items of the account which are more than six years old out of the operation of the Statute of Limitations.² Moreover, in such a case, the mere payment by the debtor of a sum generally in respect of the account, without any evidence of an appropriation of it on his part, or of any intention by him to apply it in part discharge of the items which accrued more than six years before, will not exempt these from the operation of the Statute of Limitations; though, in such case, the creditor may, unless expressly prohibited by the debtor of his own motion, at any time apply the payment to the statute-barred debts.³ A payment on account of interest generally by a party who is the maker of three promissory notes, two of which are barred by the statute, but the other of which is not barred, must *primâ facie* be attributed exclusively to the note which is not barred.⁴ A statute-barred debt will not be revived merely by an account furnished by one party, even though such account contain cross items, and fix the balance due;⁵ or by an account containing items on one side only,⁶ being actually stated and settled by both parties, for this will be no

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¹ *Bodger v. Arch*, 1854, 24 L. J. Ex. 19; *Amos v. Smith*, 1867, 1862, 31 L. J. Ex. 423; *Maber v. Maber*, 1867, 36 L. J. Ex. 70.

² *Cottam v. Partridge*, 1842, 11 L. J. C. P. 161; *Williams v. Griffiths*, 1835, 2 C. M. & R. 46; *Mills v. Fowkes*, 1839, 8 L. J. C. P. 276; *Waller v. Lacy*, 1840, 9 L. J. C. P. 217; *Williams v. Griffith*, 1849, 18 L. J. Ex. 210.

³ *Mills v. Fowkes*, 1839, 8 L. J. C. P. 276. See *Re Rainforth*, 1880, 49 L. J. Ch. 5 (C. A.).

⁴ *Nash v. Hodgson*, 1856, 25 L. J. Ch. 186.

⁵ *Bristow v. Miller*, 1828, 11 Ir. L. R. 461.

⁶ *Ashby v. James*, 1843, 12 L. J. Ex. 295 (Alderson, B.), apparently overruling *Smith v. Forty*, 1829, 4 C. & P. 126.

§§ 1081— more than a mere parol statement of, and promise to pay, an
1083. existing debt.¹ But the going through an account with items on both sides, and striking a balance, is an act equivalent to part-payment, as such a proceeding converts the *set-off* into *payments*, and raises a new consideration for the liquidation of the balance.²

§ 1082. The payment, to take the case out of the operation of the statute, may be one either of principal or of interest. But if a debt be made up of sums due on both these accounts, the payment of the principal, if accompanied by a refusal to pay interest, will raise no implied promise to also pay interest.³ The payment of interest on a debt barred by the statute, is some evidence that the principal is due, though it does not necessarily prove that fact.⁴ If such payment of interest was coupled with special circumstances, as, for instance, if it was paid upon a note, which was allowed to remain in the hands of the payee, it may be fairly regarded as a sufficient acknowledgment of the currency of the note, to revive the claim for the principal.⁵ A bill drawn in part payment of a debt operates to defeat the statute from the time of its delivery to the creditor,⁶ and this, too, whether such bill be subsequently honoured or not; for the word “payment” in Lord Tenterden’s Act is used in a popular sense, and is large enough to include not only actual cash payments, but also conditional payments.

§ 1083. The Courts for many years put a forced, though salutary, construction on Lord Tenterden’s Act, and held that the *fact* of payment could not be established by *any admission* of the debtor short of an acknowledgment in writing duly signed.⁷ However, it is now settled that a mere parol acknowledgment, either of part payment of principal, or of payment of interest,

¹ Jones v. Ryder, 1838, 4 M. & W. 32; Reeves v. Hearne, 1836, 5 L. J. Ex. 156; Hopkins v. Logan, 1839, 8 L. J. Ex. 218; Clark v. Alexander, 1844, 13 L. J. C. P. 133.

² Ashby v. James, 1843, 12 L. J. Ex. 295.

³ Collyer v. Willock, 1827, 4 Bing. 313.

⁴ Purdon v. Purdon, 1842, 12 L. J. Ex. 3.

⁵ Bealy v. Greenslade, 1831, 2

C. & J. 61; Bamfield v. Tupper, 1851, 21 L. J. Ex. 6; Re Rutherford, 1880, 49 L. J. Ch. 654 (C. A.).

⁶ Turney v. Dodwell, 1854, 23 L. J. Q. B. 137; Irving v. Veitch, 1837, 7 L. J. Ex. 25; Gowan v. Foster, 1832, 3 B. & Ad. 507.

⁷ Bayley v. Ashton, 1840, 12 A. & E. 493; Willis v. Newham, 1830, Y. & J. 518; Maghee v. O’Neil, 1841, 10 L. J. Ex. 326; Eastwood v. Saville, 1842, 11 L. J. Ex. 383.

within six years, will suffice to take a case out of the Statute of Limitations.¹ When the actual fact of some payment having been made has once been proved, recourse can be had to the parol admissions of the debtor, whether made before, or after, or at the time of payment, for the purpose of showing on what account that payment was made.² Reasonable proof must in general be given of the identity of the debt, on account of which the payment was made, with that which forms the subject-matter of the action.³ But a jury will be warranted in inferring such identity, in the absence of any proof of more debts than one being acknowledged to be due.⁴

§ 1084. "The Infants Relief Act, 1874,"⁵ prohibits the bringing of any action "upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification made after full age of any promise or contract made during infancy, whether there shall or shall not be any new consideration for such promise or ratification after full age." A ratification after the coming into operation of the Act,⁶ of a contract made before that date, is within the prohibition contained in the Act.⁷ So also is the ratification of a promise to marry.⁸ A set-off or counter-claim, arising from an alleged ratification of a contract by an infant, is also within the Act.⁹

§ 1085. By § 6 of Lord Tenterden's Act,¹⁰ "no action shall be

¹ *Cleave v. Jones*, 1852, 21 L. J. Ex. 105. See, also, *Edwards v. Janes*, 1855, 1 Kay & J. 534.

² *Waters v. Tompkins*, 1835, 2 C. M. & R. 723; *Bevan v. Gething*, 1842, 12 L. J. Q. B. 37; *Edan v. Dudfield*, 1841, 1 Q. B. 302, 307. See *Baildon v. Walton*, 1847, 17 L. J. Ex. 357.

³ *Waters v. Tompkins*, 1835, 2 C. M. & R. 723.

⁴ *Evans v. Davies*, 1836, 4 A. & E. 840; *Burn v. Boulton*, 1846, 15 L. J. C. P. 97. As to the law, where payment is made by one of several joint debtors, see ante, §§ 744—746.

⁵ 37 & 38 V. c. 62, § 2. This enactment supersedes § 5 of 9 G. 4, c. 14, or *Ld. Tenterden's Act* (which section is actually repealed by 38 & 39 V. c. 66). By § 5 of *Ld. Tenterden's Act* "no action could be maintained whereby to charge any person upon any promise made after full age to pay

any debt contracted during infancy, or upon any ratification after full age of any promise or simple contract made during infancy, unless such promise or ratification were made by some writing signed by the party to be charged therewith."

⁶ See *Smith v. King*, [1892] 2 Q. B. 543.

⁷ *Ex parte Kibble*, *Re Onslow*, 1875, L. R. 10 Ch. 373.

⁸ *Coxhead v. Mullis*, 1878, 3 C. P. D. 439. But see *Northcote v. Doughty*, 1879, 4 C. P. D. 385; *Ditcham v. Worrall*, 1880, 5 C. P. D. 410. The fixing of the wedding-day by the parties was regarded as tantamount to a fresh promise.

⁹ *Rawley v. Rawley*, 1876, 1 Q. B. D. 460 (C. A.).

¹⁰ 9 G. 4, c. 14; now in substance extended to Scotland by 19 & 20 V. c. 60, § 6.

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brought, whereby to charge any person upon, or by reason of, any representation or assurance made or given concerning or relating to the character, conduct, credit, ability, trade, or dealings of any other person, to the intent or purpose that such other person may obtain credit, money, or goods upon,¹ unless such representation or assurance be made in writing, signed by the party to be charged therewith.”² This provision was rendered necessary by the well-known case of *Pasley v. Freeman*,³ which decided that the provisions of the Statute of Frauds, requiring guarantees to be in writing,⁴ could be evaded by the plaintiff's claim being not upon a special *promise* to him, to answer for the debt or default of another, but upon a *tort* or wrong done by some false or fraudulent representation made by the defendant, in order to induce the contract.

§ 1086. The word “ability,” in the above § 6 of Lord Tenterden's Act, has been discussed more than once. In an action⁵ against certain trustees, for falsely representing that a life-tenant's interest in certain trust property was only charged with three annuities, whereby the plaintiff was induced to purchase an annuity from such life-tenant, whereas defendant well knew that such life-tenant's interest was also charged with a mortgage of 20,000*l.*, it having appeared at the trial that the representations were by parol, the judges of the Court were equally divided in opinion as to whether they related to the ability of the life-tenant in question. Parke and Alderson, BB., thought that they simply had reference to the state of the fund; Lord Abinger and Gurney, B., held that they related to the state of the fund, as an element only of the life-tenant's personal credit, and that the question which they purported to answer was in substance one regarding his ability to give security of adequate value. The latter opinion is somewhat confirmed by a subsequent decision of the Queen's Bench,⁶ where a false representation by a solicitor,

¹ The word “upon” here is obviously a misprint.

² See *Swift v. Jewesbury*, 1874, L. R. 9 Q. B. 301 (C. A.) (where the signature of a manager of a banking company was held not the signature of the bank within the meaning of this Act); overruling *Swift v.*

Winterbotham, 1873, L. R. 8 Q. B. 244.

³ Decided in 1789.

⁴ Ante, §§ 1019, 1330—1334.

⁵ *Lyde v. Barnard*, 1836, 5 L. J. Ex. 117.

⁶ *Swann v. Phillips*, 1838, 8 A. & E. 457.

that his client might be safely trusted, because he had lately purchased an estate, and the title-deeds were in his (the solicitor's) possession, so that the client could do nothing without his knowledge, was held to be a representation respecting the ability of the client, and to, consequently, require to be in writing. §§ **1086—1088.**

§ 1087. For a representation to come within the Act, it is not necessary that an action should be brought directly upon it. Therefore, where a plaintiff sought in an action for money had and received, to recover the value of goods which, on the defendant's representation as to him, had been sold to a third party, who had then paid their proceeds over to the defendant, it was held that as the plaintiff's case rested on the misrepresentation alone, it fell directly within the Act.¹ Had the misrepresentation formed only one link in the chain of fraud, by which the plaintiff had been deprived of his goods, the result might possibly have been different.² The Act also applies to a misrepresentation made by one partner respecting the credit of his firm.³ When several false representations respecting a man's character have been made by different persons, or when the same person has made one representation in writing and another in conversation, the action will be maintainable, if the jury are of opinion that the plaintiff was mainly or even partially induced by the writing declared on to give the credit which occasioned the loss.⁴

§ 1088. Another case in which it is required by statute that acknowledgments should be in writing and duly signed, is that of acknowledgments of title to real property relied on to take an adverse possession out of the operation of the Real Property Limitation Acts, 1833⁵ and 1874.⁶ By the Act of 1833,⁷ "an acknowledgment of the title of the person entitled to any land, or rent," must, to neutralise the effect of his discontinuance of the possession, or of the receipt of the profits, or of rent, be "given to him or his agent in writing, signed by the person in possession, or in the receipt of the profits of such land, or in

¹ Haslock v. Fergusson, 1837, 7 A. & E. 86.

² Id.

³ Devaux v. Steinkeller, 1839, 6 Bing. N. C. 84.

⁴ Wade v. Tatton, 1856, 25 L. J. C. P. 240.

⁵ 3 & 4 W. 4, c. 27; extended to Ireland by 6 & 7 V. c. 54 (as amended by 54 & 55 V. c. 67), and 7 & 8 V. c. 27. See ante, § 74, and n.

⁶ 37 & 38 V. c. 57. See ante, § 74, and n.

⁷ § 14 of 3 & 4 W. 4, c. 27.

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receipt of such rent." By the Act of 1874,¹ "an acknowledgment in writing of the title of the mortgagor, or of his right of redemption," must, to keep alive his rights, in the event of the mortgagee obtaining the possession or receipt of the profits of any land, or the receipt of any rent, be "given to the mortgagor, or some person claiming his estate, or to the agent of such mortgagor or person, signed by the mortgagee, or the person claiming through him."² While it is also required,³ that "no action, or suit, or other proceeding shall be brought to recover any sum of money secured by any mortgage, judgment, or lien, or otherwise charged upon, or payable out of, any land⁴ or rent, at law or in equity, or any legacy, but within twelve years next after a present right to receive the same shall have accrued to some person, capable of giving a discharge for, or release of, the same; unless, in the meantime,⁵ some part of the principal money, or some interest thereon, shall have been paid, or some *acknowledgment* of the right thereto shall have been given in *writing signed by the person by whom the same shall be payable*,⁶ or his agent, to the person entitled thereto, or his agent; and in such case no such action or suit or proceeding shall be brought, but within twelve⁷ years after such payment or acknowledgment, or the last of such payments or acknowledgments, if more than one was given."⁸

§ 1089. No acknowledgment of any title mentioned in these Acts will be operative to restore such title after it has once been

¹ § 7 of 37 & 38 V. c. 57. Set out verbatim, ante, in note to § 747.

² As to what is a sufficient acknowledgment to satisfy these words, see *Stansfield v. Hobson*, 1852, 22 L. J. Ch. 457; *Truelock v. Robey*, 1841, 15 L. J. Ch. 343; *Thompson v. Bowyer*, 1863, 2 New R. 504.

³ 37 & 38 V. c. 57, § 8, which has been substituted for § 40 of 3 & 4 W. 4, c. 27 (repealed by § 9 of 37 & 38 V. c. 57).

⁴ Money due on a bond executed by an ancestor is not a sum "charged upon, or payable out of, any land," within the meaning of this section: *Roddam v. Morley*, 1857, 26 L. J. Ch. 438; *Morley v. Morley*, 1856, 25 L. J. Ch. 329.

⁵ As to the meaning of these words, see *Harty v. Davis*, 1850, 13 Ir. L. R. 23.

⁶ As to the meaning of these words, see and compare *Toft v. Stephenson*, 1851, 21 L. J. Ch. 129; *Pears v. Laing*, 1871, L. R. 12 Eq. 41 (Bacon, V.-C.); *Bolding v. Lane*, 1863, 32 L. J. Ch. 219; and *In re Fitzmaurice*, 1864, 15 Ir. Eq. R. 445.

⁷ See *Sutton v. Sutton*, 1882, 22 Ch. D. 511; *Fearnside v. Flint*, 1882, 22 Ch. D. 579.

⁸ See 23 & 24 V. c. 38 ("The Law of Property Amendment Act, 1860"), § 13, as to claims to the estates of persons dying intestate; also, *Reed v. Fenn*, 1866, 35 L. J. Ch. 464.

extinguished by the effluxion of time.¹ The acknowledgments, §§ 1089—also, must be distinct and unconditional. An acknowledgment 1091 conditional on an arrangement which was never carried into effect cannot be regarded as an acknowledgment of title within the Act of 1833.² Where, however, an acknowledgment is distinct, no objection can be taken to it on the ground that it was obtained by compulsion and given upon oath. Therefore, an answer to a bill in Chancery under the old pleading, acknowledging the plaintiff's title, is sufficient.³

§ 1090. Actions for debt for rent upon an indenture of demise, or of covenant or debt upon any bond or other specialty, or of debt or scire facias upon recognisance, must be brought within twenty years after the cause of such actions or suits.⁴ And "if any acknowledgment shall have been made, either by *writing signed by the party liable* by virtue of such indenture, specialty, or recognisance, or *his agent*, or by part-payment⁵ or part-satisfaction, on account of any principal or interest being then due thereon," the plaintiff may bring his action for the money remaining unpaid, and so acknowledged to be due, within twenty years after such acknowledgment.⁶

§ 1091. In acknowledgments by signed writings under this Act, the amount need not be specified (any more than in acknowledgments under Lord Tenterden's Act); but if *anything* be due, the amount may be proved by parol evidence.⁷ Such an acknowledgment, too, need not amount to a promise to pay,⁸ though it must contain an admission of an actually existing debt, and will not suffice if it merely shows that a debt was due at some prior time.⁹ It will (unlike admissions of simple contract debts under the old Statute of Limitations)¹⁰ be sufficient if addressed to a

¹ *Sanders v. Sanders*, 1882, 19 Ch. D. 380 (C. A.).

² *Doe v. Edmonds*, 1840, 6 M. & W. 302. See *Doe v. Beckett*, 1843, 12 L. J. Q. B. 236, and cases cited in the last five notes.

³ *Goode v. Job*, 1858, 28 L. J. Q. B. 1.

⁴ See "The Act for the Amendment of the Law, 1833," being 3 & 4 W. 4, c. 42, § 3, cited ante, § 75B, n. 2. The Irish Act (16 & 17 V. c. 113) contains a somewhat similar provision,

in § 20.

⁵ See *Ashlin v. Lee*, 1875, 44 L. J. Ch. 376.

⁶ 3 & 4 W. 4, c. 42 ("The Act for the Amendment of the Law, 1833"), § 5, and 16 & 17 V. c. 113, § 23 (Ir.).

⁷ *Howcutt v. Bonser*, 1849, 18 L. J. Ex. 262. See ante, § 1075.

⁸ *Moodie v. Bannister*, 1859, 28 L. J. Ch. 881. See ante, § 1075.

⁹ *Howcutt v. Bonser*, 1849, 18 L. J. Ex. 262.

¹⁰ See ante, § 1075.

§§ 1091—1093. third party.¹ So that a recital by a mortgagor, in an assignment of his equity of redemption, that all interest was paid upon a mortgage, was in an action by the mortgagee against the mortgagor on the original mortgage deed, within twenty years from the date of the assignment, held to be ample evidence of an acknowledgment by part-payment of interest, so as to take the case out of the statute.² In the same case it was also held that the payment to the mortgagee by the assignee, in pursuance of a covenant so to do contained in it, of interest accrued subsequently to the assignment, was a sufficient acknowledgment as against the mortgagor.³

§ 1092. By the *Prescription Acts*,⁴ claims to rights of common and other profits à prendre,⁵ to rights of way or other easements, to the use of light, to the payment of a modus, or to exemption from tithes, are rendered indefeasible after enjoyment *as of right* for certain defined periods,⁶ unless it shall appear that the respective privileges were enjoyed “by some consent or agreement expressly made or given for that purpose by deed or writing.”

§ 1093. By “The Railway and Canal Traffic Act, 1854,”⁷ no special contract between any railway or canal company and any other party respecting the receiving, forwarding, or delivering of any animals, articles, goods, or things, shall be binding upon or affect any such party, unless it be just and reasonable, and signed by such party, or by the person delivering such things for carriage.⁸

¹ *Moodie v. Bannister*, 1859, 28 L. J. Ch. 881; resolving a point left undecided in *Howcutt v. Bonser*, 1849, 18 L. J. Ex. 262. See *Wilby v. Elgee*, 1875, L. R. 10 C. P. 497.

² *Forsyth v. Bristowe*, 1853, 22 L. J. Ex. 255.

³ *Id.*

⁴ 2 & 3 W. 4, c. 71 (“The Prescription Act, 1832”), §§ 1—3, extended to Ireland by 21 & 22 V. c. 42; 2 & 3 W. 4, c. 100, § 1. See ante, § 75A, n.

⁵ The Act does not apply to profits à prendre in gross: *Shuttleworth v. Le Fleming*, 1865, 34 L. J. C. P. 309; or to rights claimed by a copyholder in his own tenement according to the

custom of the manor: *Hanmer v. Chance*, 1865, 34 L. J. Ch. 413.

⁶ If a payment of an annual sum has been made in respect of the user, the inference is that the enjoyment has not been *as of right*: *Gardner v. Hodgson's Kingston Brewery Co.*, [1903], A. C. 229 (H.L.).

⁷ 17 & 18 V. c. 31, § 7; *Gregory v. W. Midl. Rail. Co.*, 1864, 33 L. J. Ex. 155.

⁸ See *Wise v. Gt. West. Rail. Co.*, 1856, 25 L. J. Ex. 258; *Simons v. Gt. West. Rail. Co.*, 1857, 26 L. J. C. P. 25; *Lond. & N. West. Rail. Co. v. Durham*, 1856, 18 C. B. 826; *Pardington v. S. Wales Rail. Co.*, 1856, 26 L. J. Ex. 105; *Peek v.*

§ 1094. An acceptance of a bill is by The Bills of Exchange Act, 1882,¹ invalid, unless, among other conditions, "it be written on the bill and be signed by the drawee:" but "the mere signature of the drawee without additional words is sufficient."

§§ 1094—
1097.

§ 1095. By the Truck Acts, 1831 to 1887,² no stoppage or deduction shall in any case be made from the wages of any artificer protected by those statutes, unless the agreement "for such stoppage or deduction shall be in writing, and signed by such artificer."³

§ 1096. A "declaration in writing" by such "lodger"⁴ to the effect stated in such Act is, by the "Lodgers Protection Act,"⁵ necessary to be made by a lodger who seeks to protect his goods from being distrained upon for rent due to the superior landlord. To such declaration must⁶ be annexed a correct inventory subscribed by the lodger, of the furniture, goods, and chattels referred to in the declaration. The declaration will be inoperative, unless made *after* the distress has been levied, or at least, authorised or threatened."⁷

§ 1097. Any special agreement between a solicitor and his client "respecting the amount and manner of payment" for such solicitor's services, whether past or future, is by the "Attorneys' and Solicitors' Act, 1870,"⁸ required to be in *writing*, and be signed by both parties,⁹ and must be pronounced, either by the taxing master or by the court, to be

N. Stafford. Rail. Co., 1863, 32 L. J. Q. B. 241 (H. L.); *M'Manus v. Lanc. & Yorkshire Rail. Co.*, 1859, 4 H. & N. 327; *Lewis v. Gt. West. Rail. Co.*, 1860, 29 L. J. Ex. 425 (C. A.); same name, but different case, 1877, 47 L. J. Q. B. 131 (C. A.); *Beal v. S. Devon Rail. Co.*, 1864, 29 L. J. Ex. 441; *Lloyd v. Waterford & Lim. Rail. Co.*, 1862, 15 Ir. C. L. R. 37.

¹ 45 & 46 V. c. 61, § 17.

² 1 & 2 W. 4, c. 37; 50 & 51 V. c. 46.

³ See §§ 23, 24 of 1 & 2 W. 4, c. 37. On its construction, see *Cutts v. Ward*, 1867, L. R. 2 Q. B. 357; *Pillar v. Llynvi Coal Co.*, 1869, L. R. 4 C. P. 752.

⁴ As to the meaning of the word

"lodger," see *Phillips v. Henson*, 1877, 3 C. P. D. 26; but *quære*. See, also, *Heawood v. Bone*, 1884, 13 Q. B. D. 279.

⁵ 34 & 35 V. c. 97, § 1.

⁶ It is, however, not quite clear whether the declaration must be "subscribed" as well as the inventory.

⁷ *Thwaites v. Wilding*, 1883, 12 Q. B. D. 4.

⁸ 33 & 34 V. c. 28, §§ 4, 9.

⁹ Re *Lewis*, *Ex parte Munro*, 1876, 1 Q. B. D. 724. Such an agreement cannot, indeed, be enforced by action (see 33 & 34 V. c. 28, § 8), but the remuneration agreed upon may, if the terms be fair and reasonable, be recovered in a summary way.

**§§ 1097,
1098.**

fair and reasonable. Similarly, under the Solicitors Remuneration Act, 1881,¹ the parties may agree in writing as to the remuneration to be paid to the solicitor for work to be done in respect of conveyancing and other non-contentious business. The agreement must, by section 8, sub-section 2, be in writing, but need only be signed by the party to be charged.² The agreement may be impeached upon the like grounds as an agreement not relating to the remuneration of a solicitor; and upon a taxation, if a client objects to the agreement as unfair or unreasonable, the taxing master may inquire into the facts and certify the same to this Court.³ An undertaking by a solicitor to "charge nothing if he lost the action," does not fall within these provisions, and need not to be in writing.⁴

1098. An agreement in writing is by "The Merchant Shipping Act, 1894,"⁵ required to be entered into by the master of every ship⁶ with every seaman whom he carries to sea from any port of the United Kingdom as one of his crew, which must be in a form sanctioned by the Board of Trade,—must be dated at the time of the first signature being attached to it,—must contain a variety of particulars specified in the Act,—and must be signed first by the master and afterwards by the seaman; and the signature of the seaman to which must be duly attested in the case of a foreign-going ship by a shipping-master, and in the case of a home-trade ship, either by a shipping-master or by some other witness; and in either event, read over and explained to him, before the seaman executes the instrument, or, at least, ascertained by the witness to be understood by him. The same statute also enacts⁷ that "every indenture of apprenticeship to the sea service made in the United Kingdom by a board of

¹ 44 & 45 V. c. 44.

² *Re Frape*, [1893] 2 Ch. 284; *Re Haslam*, [1902] 1 Ch. 769.

³ § 8, sub-sect. 4 of the Act.

⁴ *Jennings v. Johnson*, 1873, L. R. 8 C. P. 425.

⁵ 57 & 58 V. c. 60, §§ 113—116.

As to how the agreement is to be attested if the seaman is engaged in a colonial or foreign port, see § 124. As to what attestation is necessary when the agreement is altered by the consent of all parties, see § 122.

As to how releases between master and seaman are to be attested and proved, see § 138. As to agreements by sea fishermen with boys under sixteen, and apprenticeships to the sea fishing service, see §§ 392 *et seq.*, especially 395, which requires such agreement to be made before a super-intendent.

⁶ Ships of less than eighty tons, exclusively employed in the coasting trade, excepted.

⁷ By § 107.

guardians, or persons having the authority of a board of §§ 1098—
guardians, shall be executed by the boy and the person to whom 1101.
he is bound in the presence of, and shall be attested by, two
justices of the peace, and those justices shall ascertain that
the boy has consented to be bound, and has attained the age of
twelve years, and is of sufficient health and strength, and that
the master to whom the boy is to be bound is a proper person
for the purpose.”

§ 1099. It is necessary by “The Pawnbrokers Act, 1872,”¹ in
every case of a special contract by a pawnbroker with a pawner,
that a special ticket signed by the pawnbroker be delivered to the
pawner, and that the pawner sign a duplicate of such ticket.
Special contracts may only be made by pawnbrokers with pawners
as to pledges for loans above 40s.

§ 1099A. Under both the Dublin and London Hackney Carriage
Acts,² a contract in writing, signed by such driver or conductor in
the presence of a competent witness, is required to enable a pro-
prietor of such carriages to enforce the payment of any sum,
claimed from any driver or conductor on account of his earnings.

§ 1100. An order for the reception of a lunatic will be only
valid if duly made in writing on one of the forms given in the
Schedule to the Lunacy Act, 1890.³

§ 1101. By the Bankruptcy Act and Rules of 1886 and 1890,⁴
a general proxy must be in writing in a form provided, and in
favour of either the Official Receiver, or the manager, or clerk, or
other person in the regular employ of the creditor;⁵ though a
special proxy may be in favour of any one whom the creditor
thinks fit to name,⁶ while in either case such writing must be
signed by the creditor and attested by a witness,⁷ and all blanks
in it must be filled up in the creditor's own handwriting, or in
that of a clerk or manager in his regular employment, or of a

¹ 35 & 36 V. c. 93, § 24. Tickets
and duplicates under this Act are
exempt from stamp duty by § 24 of
the Act.

² 6 & 7 V. c. 86 (“The London
Hackney Carriages Act, 1843”), § 23;
16 & 17 V. c. 112, § 36 (Ir.). Under
the London Act the agreement re-
quires no stamp. § 23.

³ 53 V. c. 5.

⁴ See Sched. 1 of 1883 Act (46 &
47 V. c. 52), rr. 15—21; see, also,
Bkpty. Rules, 1886 and 1890.

⁵ Sched. 1 of Act of 1883, rr. 17,
21.

⁶ Sched. 1 of Act of 1883, and § 22,
clause 3, of Bankruptcy Act, 1890.

⁷ For form of general proxy, Form
75; form of special proxy, Form 76.

§§ 1101— Commissioner to administer oaths in the Supreme Court.¹ The
 1102a. agent of a corporation may fill up blanks, and sign for his principals, but he must expressly state that he is “duly authorised under the seal of the company.”² It is further required that voting letters, which are now available by creditors who have proved their debts, for the purpose of assenting to, or dissenting from, a debtor’s or a bankrupt’s proposal for a composition or a scheme of arrangement, shall be in a prescribed form, and signed and witnessed.³

§ 1101A. Every notice to quit to be served on a tenant of a holding, must, under “The Landlord and Tenant, Ireland, Act, 1870,”⁴ be in writing or print, bearing a half-crown stamp, “and signed by the landlord or his agent lawfully authorised thereunto.”

§ 1102. All notices of objection to persons remaining on the list of Parliamentary voters, must⁵ be individually signed at the foot of the notice by the person objecting; and if the notice is sent by the post, and the service of it is sought to be established by the production of a duplicate stamped at the Post-office, this duplicate must be personally subscribed, and externally directed, in the same manner as the copy sent.⁶ Under the same Act, notices of intention to prosecute an appeal, whether transmitted to the Central Office of the Supreme Court, or sent to the respondent, must be signed by the appellant himself.⁷

§ 1102A. It is again required by a further Act,⁸ that all Notices

¹ Bankruptcy Act, 1890 (53 & 54 V. c. 71), § 22, sub-s. 1.

² See Forms 75, 76.

³ 53 & 54 V. c. 71, § 3, sub-s. 4, and Form 82.

⁴ 33 & 34 Vict. c. 46, § 58 (Ir.).

⁵ By 6 & 7 V. c. 18 (“The Parliamentary Voters Registration Act, 1843”), § 7, and Sched. A., Nos. 4 and 5, as to counties; § 17, Sched. B., Nos. 10 and 11, as to cities and boroughs: *Toms v. Cuming*, 1845, 14 L. J. C. P. 58; *Pruen v. Cox*, 1845, 15 L. J. C. P. 17. As to the Irish law, see 13 & 14 V. c. 69, §§ 26, 36.

⁶ 6 & 7 V. c. 18 (“The Parliamentary Voters Registration Act, 1843”), § 100; *Toms v. Cuming*,

1845, 14 L. J. C. P. 58; *Birch v. Edwards*, 1847, 17 L. J. C. P. 32; *Lewis v. Roberts*, 1861, 31 L. J. C. P. 51; *Smith v. James*, 1861, 11 C. B. N.S. 62. See *Barclay v. Parrott*, 1856, 26 L. J. C. P. 77; *Benesh v. Booth*, 1864, 34 L. J. C. P. 99. See, also, 13 & 14 V. c. 69 (“The Representation of the People (Ireland) Act, 1850”), § 113, as to the Irish law.

⁷ 6 & 7 V. c. 18 (“The Parliamentary Voters Registration Act, 1843”), § 62; *Petherbridge v. Ash*, 1846, 4 C. B. 74. See *Rawlins v. West Derby*, 1846, 15 L. J. C. P. 70. As to the Irish law, see 13 & 14 V. c. 69, § 75.

⁸ 12 & 13 V. c. 45 (“The Quarter Sessions Act, 1849”), §§ 1, 2. See,

of Appeal to any court of general or quarter sessions, other than those against summary convictions, orders of removal, orders under any statute relating to pauper lunatics, orders in bastardy, or any proceedings by virtue of any Act relating to the revenue, shall specify in writing the particular grounds of appeal, and be signed by the person giving the same, or his solicitor on his behalf. §§ 1102a—1103-4.

§§ 1103-4. A pauper cannot, under the Poor Law Amendment Acts,¹ be removed from one parish to another unless by written consent, until twenty-one days after notice of chargeability *in writing*, accompanied by a copy or counterpart of the order of removal, and by a statement of the grounds of removal under the hands of *the overseers or guardians of the parish* obtaining such order, or any *three or more of such guardians*, shall have been sent by them through the post or otherwise to the overseers of the parish to whom any such order shall be directed. Moreover, no appeal can be heard against such an order, unless the *overseers or guardians* of the appellant parish, or any three or more of such *guardians*, shall have sent or delivered to the overseers of the respondent parish *a statement in writing under their hands* of the grounds of appeal with the notice of appeal, or fourteen days at least before the first day of the sessions at which such appeal is intended to be tried.² In construing these provisions it has been held that, although notices of appeal may be signed by the solicitor on behalf of the appellant parish,³ notices of chargeability, and statements of grounds of removal and of appeal, must respectively bear the signatures of the overseers or guardians.⁴ They will,

also, 47 & 48 V. c. 43 ("The Summary Jurisdiction Act, 1884"), Sched. In *R. v. J.J. of Kent*, 1873, L. R. 8 Q. B. 305, the Court held that the statute was complied with though the notice of appeal was signed only by the *clerk* of appellants' attorney. Sed qy.

¹ 4 & 5 W. 4, c. 76, § 79; 11 & 12 V. c. 31 ("The Poor Law Procedure Act, 1847"), §§ 2, 9.

² 4 & 5 W. 4, c. 76, § 81. Both the notice of appeal, as also the statement of grounds of appeal, may be transmitted through the post (14 & 15 V. c. 103, or "The Poor Law

Amendment Act, 1851," § 10), and the fourteen days will be calculated from the time when, according to the usual course of post, the notice ought to reach the respondents: *R. v. Slawstone*, 1852, 21 L. J. M. C. 145.

³ *R. v. Middlesex*, 1850, 1 L. M. & P. 621; *R. v. Carew*, 1850, 1 L. M. & P. 626 n.

⁴ *R. v. Derby*, 1850, 1 L. M. & P. 660; *R. v. Middlesex*, 1850, 1 L. M. & P. 625; *R. v. Worcester*, 1838, 5 Q. B. 508 n.; *R. v. Surrey*, 1844, 5 Q. B. 506.

§§ 1103-4 however, be valid if signed by a majority of the aggregate body of the overseers and churchwardens;¹ though they must be signed by at least such a majority.² Still, it is not necessary that the document should show on its face that it proceeds from a majority of the parish officers,³ but it is certainly very desirable that this fact should appear.⁴ The guardians mentioned in these clauses are not guardians of a union, but are guardians expressly appointed⁵ to act for particular parishes.⁶ As a parish is generally bound by the acts of those persons whom it represents to be its officers, the adverse parish, on a principle of reciprocity, is precluded from disproving the legality of the appointments of such officers, unless the notice signed by them be invalid on its face.⁷

§ 1105. By the Metropolis Management Act, 1855,⁸ it was enacted that "every notice, demand, or like document given by or on behalf of the Metropolitan Board of Works, or any vestry or district Board under that Act, may be in writing or print, or partly in writing and partly in print, and shall be sufficiently authenticated if signed by their clerk, or by the officer by whom the same is given."⁹ By the Local Government Act, 1888,¹⁰ the London County Council now exercises the functions formerly possessed by the Metropolitan Board of Works.

§ 1105A. It is also, by the Companies Act, 1862,¹¹ enacted that "any summons, notice, order, or proceeding requiring authentication by the Company, may be signed by any director, secretary, or other authorised officer of the Company, and need not be under the common seal of the Company, and the same may be in writing or in print, or partly in writing and partly in print."

§ 1105B. Similar provisions to those already cited may be found in a multitude of other statutes.¹²

¹ *R. v. Warwickshire*, 1837, 6 A. & E. 873; *R. v. Derbyshire*, 1837, 6 A. & E. 885.

² *R. v. Westbury*, 1844, 5 Q. B. 500.

³ *R. v. Colerne*, 1850, 17 L. J. M. C. 121.

⁴ *R. v. Westbury*, 1844, 5 Q. B. 500.

⁵ Under 4 & 5 W. 4, c. 76.

⁶ *R. v. Surrey*, 1844, 5 Q. B. 506; *R. v. Lambeth*, and *R. v. Southamp-*

ton, 1845, 5 Q. B. 513.

⁷ *R. v. Leominster*, 1845, 13 L. J. M. C. 54.

⁸ 18 & 19 V. c. 120, § 222.

⁹ See *In re Balls and Met. Board of Works*, 1866, L. R. 1 Q. B. 337.

¹⁰ 51 & 52 V. c. 41, § 40.

¹¹ 25 & 26 V. c. 89, § 64.

¹² See, for example, "The Telegraph Act, 1878" (41 & 42 V. c. 76), § 12.

§ 1106. Warrants and other instruments issuing from the *Treasury* may now in all cases be issued under the hands of any two or more of the commissioners.¹ A like convenient rule has been adopted in reference to all orders and other documents emanating from the Commissioners of Customs.² Again, the rules, orders, or regulations of the Local Government Board for England, will be valid if made under seal, and signed by the president or one of the *ex officio* members, and countersigned by a secretary or his assistant.³ The validity of rules and orders made by the Local Government Board for Ireland,⁴ or by the late Irish Poor Law Commissioners,⁵ will be also found to depend on somewhat similar provisions.

§§ 1106,
1107.

§ 1107. Whenever it is sought to know whether, when an Act of Parliament renders the signature of a person necessary, a signature by his agent or by procuration will suffice, particular attention must of course be paid to the language employed by the Legislature in each case. In some cases the signature of an agent will not suffice at all.⁶ In other cases, though the paper may be signed by an agent, yet his *authority* to do so must be *evidenced in writing*.⁷ In yet further cases, agents to sign the documents are *not required to act under any written authority*.⁸

¹ 12 & 13 V. c. 89 ("The Treasury Instruments (Signature) Act, 1849").

² 39 & 40 V. c. 36 ("The Customs Consolidation Act, 1876"), § 10.

³ 34 & 35 V. c. 70 ("The Local Government Board Act, 1871"), § 5.

⁴ 35 & 36 V. c. 69 ("The Local Government Board (Ireland) Act, 1872"), § 4 (Ir.).

⁵ 10 & 11 V. c. 90 ("The Poor Relief (Ireland) Act, 1847"), §§ 3, 12, 18 (Ir.), as amended by 19 & 20 V. c. 14 (Ir.).

⁶ Stated alphabetically, some of the more important of the cases in which the signature of an agent will not suffice at all are as under:—*Frauds*, § 7 of the Statute of (supra, § 1016); *Hackney Carriage Acts* for London and Dublin (supra, § 1099A); *Lord Tenterden's Act* (supra, § 1085); "The Merchant Shipping Act, 1894" (supra, § 1098); "The Pawnbrokers Act, 1872" (supra, § 1099); "The

Prescription Act, 1832" (supra, § 1092); *Real Property Limitation Acts* (supra, § 1088); and see *Corp. of Dublin v. Judge*, 1847; "The Sculpture Copyright Act, 1814" (54 G. 3, c. 56), § 4; "The Truck Acts" (supra, § 1095); "The Voters Registration Act" (supra, § 1102).

⁷ For instance, this is expressly required in the 1st and 3rd sections of the Statute of *Frauds* (ante, §§ 1001, 1003), and also in the 3rd section of the Act relating to copyright in paintings, drawings, and photographs (25 & 26 V. c. 68 ("The Fine Arts Copyright Act, 1862")).

⁸ Stated alphabetically, some of the principal of the cases in which the signature of an agent need not be in writing are those under:—"Act for the Amendment of the Law, 1833" (supra, § 1090); *Baines's Act* (12 & 13 V. c. 45), § 1 (supra, § 1102A); "The Dramatic Copyright Act" (3 & 4 W. 4,

§§ 1108,
1109.

§ 1108. Even though an agent has acted in the first instance without any authority whatever, a subsequent recognition, even merely by conduct, of his act by the principal will satisfy the respective statutes.¹

§ 1109. The application of these rules rests on no principle, but is the result of arbitrary, if not of accidental, legislation. Its result is, in some cases, absurd. Thus, while no action can be brought against a man for falsely representing his friend to be a person of substance, *unless such representation be in writing signed by himself*, any person may be sued on an ordinary guarantee to be answerable for another's debt, *if the promise to pay be given in writing by his authorised agent*.² An agent cannot bind his principal by surrendering a lease not exceeding the term of three years, *unless he be duly authorised in writing*, but may enter into a contract for the sale of lands or of merchandise, whatever their respective values,³ under a mere oral authority. An *auctioneer*,⁴ however, is, at the time of the auction,⁵ regarded as the agent of both vendor and purchaser (whether the subject of the sale be lands or goods), and if a complete contract can be made out from the memoranda and entries at the auction signed by him, it is sufficient to bind them both.⁶ A broker, too, is generally considered to be the agent of both buyer and seller; but a factor, except under special circumstances, is the agent of the seller alone.⁷

c. 15. as to construction of which see *Morton v. Copeland*, 1855, while as to "The Sculpture Copyright Act," see *supra*, note to § 1107; *Frauds*, § 4 of the Statute of (as to which see *Heard v. Pilley*, 1869, L. R. 4 Ch. 548; and *Cave v. Mackenzie*, 1877, 46 L. J. Ch. 564); *Frauds*, § 17 of the Statute of (*supra*, §§ 1019, 1020); "The Mercantile Law Amendment Act, 1856" (*supra*, § 1073); "The Railway and Canal Traffic Act, 1854" (*supra*, § 1093); and see *Aldridge v. G. W. Ry.*, 1864, 33 L. J. C. P. 161; and "The Real Property Limitation Act, 1874" (*supra*, § 1088).

¹ *Maclean v. Dunn*, 1828, 4 Bing. 722; *Gosbell v. Archer*, 1835, 2 A. & E. 500; *Fitzmaurice v. Bayley*, 1856, 9 H. L. C. 78.

² *Lyde v. Barnard*, 1836, 5 L. J. Ex. 117.

³ See *ante*, §§ 1003, 1019, 1020; *Sug. V. & P.* 145; and *Hunter v. Parker*, 1840, as reported 7 M. & W. 343.

⁴ This does not, save under special circumstances (see *Bird v. Boulter*, 1833, 4 B. & Ad. 443), extend to the auctioneer's clerk: *Peirce v. Corf*, 1874, L. R. 9 Q. B. 210.

⁵ But at that time only: *Mews v. Carr*, 1856, 26 L. J. Ex. 29.

⁶ *Emmerson v. Heelis*, 1809, 2 Taunt. 38; *White v. Proctor*, 1811, 4 Taunt. 209; *Kenworthy v. Schofield*, 1824, 2 B. & C. 947; *Wood v. Midgley*, 1854, 23 L. J. Ch. 553; *Carrigy v. Brock*, 1871, 5 Ir. C. L. R. 501; *Peirce v. Corf*, 1874, L. R. 9 Q. B. 210; *Bishton v. Whatmore*, 1878, 8 Ch. D. 467; *Sug. V. & P.* 146, 147.

⁷ See *Darrell v. Evans*, 1862, 31 L. J. Ex. 337. See *ante*, § 1020, n.

§ 1109A. From these latter examples it may be perceived that there is no rule to prevent any man from signing a document in a double capacity, first, as agent for one of the contracting parties, and next, in his own right.¹ Neither is it necessary in such a case that he should sign his name twice over, but the law will be satisfied, if it can be proved by parol evidence that, although apparently signing as a mere agent, he really intended to bind himself as well as his principal.²

§§ 1109a,
1110.

§ 1110. Besides the Acts noticed above (and many others of a like nature), by which various transactions are required to be evidenced by writing, numerous other statutes render it necessary to the validity of certain documents that they should be executed or attested in a particular form.³ Two or more credible witnesses are, for instance, necessary to attest registers of marriages, whether in this country,⁴ or,—since the 1st of January, 1852,—in India;⁵ assignments⁶ of bail bonds;⁷ the protest by any person other than a notary public, of a bill of exchange, whether such protest be for non-acceptance or non-payment;⁸ memorials of deeds registered under the Middlesex Registration Act;⁹ the deed of a father appointing a guardian of his child;¹⁰ all deeds by which new trustees of property conveyed for religious or educational purposes may now be appointed;¹¹ and conveyances to

¹ *Young v. Schuler*, 1883, 11 Q. B. D. 671 (C. A.).

² *Young v. Schuler*, 1883, 11 Q. B. D. 671 (C. A.).

³ As to the mode of executing deeds under powers, see 22 & 23 V. c. 35 ("The Law of Property Amendment Act, 1859"), § 12.

⁴ 6 & 7 W. 4, c. 85 ("The Marriage Act, 1836"), § 23; 6 & 7 W. 4, c. 86 ("The Births and Deaths Registration Act, 1836"), § 31.

⁵ 14 & 15 V. c. 40, § 11.

⁶ It is now finally decided that assignments of copyright, though granted before the 1st of July, 1842 (when 5 & 6 V. c. 45 ("The Copyright Act, 1842"), came into operation) do not require to be attested by two witnesses. See *Cumberland v. Copeland*, 1861, 31 L. J. Ex. 353 (Ex. Ch.). See, also, *Jefferys v. Boosey*, 1854, 4 H. L. C. 815; and *Kyle v. Jeffreys*, 1859, 3 Macq. 617

(H. L.) (Id. Wensleydale).

⁷ 4 A. c. 16, § 20.

⁸ 45 & 46 V. c. 61 ("The Bills of Exchange Act, 1882"), §§ 51, 52, 94, and Sched. 1. These protests, so far as inland bills are concerned, are very unusual, and of little, if any, use. See *Windle v. Andrews*, 1819, 2 B. & Ald. 696.

⁹ 7 A. c. 20 ("The Middlesex Registry Act, 1708"), § 1, amended by "The Land Registry (Middlesex Deeds) Act, 1891" (54 & 55 V. c. 64); *R. v. Reg. of Deeds for Middlesex*, 1859, 28 L. J. Q. B. 77.

¹⁰ 12 C. 2, c. 24, §§ 8, 9, as amended by "The Statute Law Revision Act, 1888" (51 V. c. 3). The guardian himself may be one of the witnesses: *Morgan v. Hatchell*, 1855, 24 L. J. Ch. 135.

¹¹ 13 & 14 V. c. 28 ("The Trustee Appointment Act, 1850"), extended by 53 & 54 V. c. 19.

§§ 1110—
1112.

charitable uses under the Mortmain Act.¹ Under the Bills of Sale Acts, 1878 and 1882, “the execution of every bill of sale by the grantor must be attested by one or more credible witness or witnesses, not being a party or parties thereto;”² but, since the 18th of August, 1882,—except in the case of an *absolute* bill of sale,³—it is no longer necessary, as it was under the Act of 1878,⁴ that any such witness should be a solicitor.⁵ And every lease made under “The Leasing Powers Act for religious worship in Ireland, 1855,” must be “by indenture, sealed and delivered by or on behalf of the lessor in the presence of one or more than one witness,” although, singularly enough, the statute does not require that such witness should attest the instrument by attaching his signature to it.⁶

§ 1111. It is, moreover, enacted by the English Debtors Act, 1869,⁷ and the Irish Debtors Act, 1872,⁸ that a *warrant of attorney* to confess judgment in any personal action, or *cognovit actionem*, given by any person, shall not be of any force, unless there is present some [solicitor] of one of the superior courts on behalf of such person, *expressly named by him*, and attending at his request, to inform him of the nature and effect of such warrant or cognovit, before the same is executed; which [solicitor] shall subscribe his name as a witness to the due execution thereof, and *thereby declare himself to be [solicitor] for the person executing the same, and state that he subscribes as such [solicitor].*” And no warrant or cognovit executed in any other manner shall be “rendered valid, by proof that the person executing the same did in fact understand the nature and effect thereof, or was fully informed of the same.”⁹

§ 1112. The attesting witness to a warrant of attorney or cognovit must be an actual solicitor,¹⁰ though it is not necessary

¹ See *Wickham v. M. of Bath*, 1865, L. R. 1 Eq. 17.

² 45 & 46 V. c. 43, § 10; 46 V. c. 7, § 10 (Ir.).

³ *Casson v. Churchley*, 1884, 53 L. J. Q. B. 335; *Swift v. Pannell*, 1883, 24 Ch. D. 210.

⁴ 41 & 42 V. c. 31, § 10.

⁵ 45 & 46 V. c. 43, § 10; 46 V. c. 7, § 10 (Ir.).

⁶ 18 & 19 V. c. 39, § 10, which

enacts also, that “the counterpart of every such lease shall be executed by the lessee thereof.” These words would seem to preclude an agent from executing the counterpart under a power of attorney from the lessee.

⁷ 32 & 33 V. c. 62, § 24.

⁸ 35 & 36 V. c. 57, § 23.

⁹ 32 & 33 V. c. 62, § 25; 35 & 36 V. c. 57, § 24 (Ir.).

¹⁰ *Paul v. Cleaver*, 1810, 2 Taunt. 360.

§ 1112.

for him to have taken out his certificate.¹ But a defendant who introduces a person as a solicitor will be estopped from afterwards denying his character, at least, unless he can clearly show that he acted in ignorance.² The solicitor attending on behalf of the defendant must be some person other than the legal adviser, or the agent of the legal adviser, acting for the plaintiff;³ and though the statute does not require that the plaintiff should employ a solicitor, yet as he seldom, in fact, proceeds in these matters without the assistance of one, it ought to be perfectly clear, in the event of a single solicitor being present, that he was acting exclusively on behalf of the defendant.⁴ It is not necessary that the solicitor should be originally or spontaneously named by the defendant, or should come to the place of meeting at his request; but if he remains there at the defendant's request, and is clearly and expressly adopted by him as his solicitor, this will suffice, though he may have been introduced by the plaintiff himself, or by his legal adviser.⁵ Still, as an introduction from such a quarter will always be regarded with distrust, and may often, when taken in conjunction with other suspicious circumstances, raise a strong inference of fraud, it is never advisable for a plaintiff or his solicitor to interfere in this manner;⁶ and the imprudence of such a course will be more apparent, when it is considered, that in all cases of this kind it must distinctly appear, that the defendant was fully aware of his having an option in the choice of his solicitor, and, moreover, that he had an opportunity of exercising such option, and did in fact exercise it.⁷

¹ *Holgate v. Slight*, 1851, 21 L. J. Q. B. 74.

² *Cox v. Cannon*, 1838, 4 Bing. N. C. 453; *Jeyes v. Booth*, 1797, 1 B. & P. 97; *Wallace v. Brockley*, 1837, 5 Dowl. 695; *Price v. Carter*, 1845, 7 Q. B. 838.

³ *Mason v. Kiddle*, 1839, 9 L. J. Ex. 37; *Rising v. Dolphin*, 1840, 8 Dowl. 309; *Pryor v. Swaine*, 1844, 2 Dowl. & L. 37; *Hirst v. Hannah*, 1851, 17 Q. B. 353.

⁴ *Sanderson v. Westley*, 1840, 9 L. J. Ex. 204; *Cooper v. Grant*, 1852, 21 L. J. C. P. 197; *Hirst v. Hannah*, 1851, 17 Q. B. 383; *Walsh*

v. Nally, 1877, Ir. R. 11 C. L. 337.

⁵ *Walton v. Chandler*, 1845, 14 L. J. C. P. 149; *Taylor v. Nicholls*, 1840, 9 L. J. Ex. 78; *Bligh v. Brewer*, 1834, 1 C. M. R. 651; *Oliver v. Woodroffe*, 1839, 4 M. & W. 650; *Pease v. Wells*, 1840, 8 Dowl. 626; *Joel v. Dicker*, 1847, 16 L. J. Q. B. 359; *Nolan v. Gumley*, 1863, 14 Ir. C. L. R. 301.

⁶ *Taylor v. Nicholls*, 1840, 9 L. J. Ex. 78.

⁷ *Gripper v. Bristow*, 1840, 9 L. J. Ex. 324; *Barnes v. Pendrey*, 1839, 7 Dowl. 747; *Walker v. Gardner*, 1832, 4 B. & Ad. 371.

§§ 1113—
1116.

§ 1113. The solicitor who attests it is not bound to read the warrant of attorney or cognovit over to his client unless desired to do so; but he attends for the purpose of explaining its nature and effect; and even this explanation may be waived if the client does not require it.¹ The subscription by the witness must be an actual visible subscription; and a retracing of a previous attestation and signature with a dry pen is not sufficient.² The law does not prevent the solicitor to whom a warrant is addressed, and who is therefore entitled to enter up judgment upon it, from acting as solicitor for the defendant to attest the execution.³ Lastly, in the memorandum of attestation the subscribing witness must distinctly state, first, that he is the solicitor of the party executing the instrument, and next, that he subscribes as such.

§ 1114. No precise form of words is indeed necessary. But those used must enable the Courts, either directly or by necessary inference, to collect *both* the facts above stated to be necessary.⁴ Where, therefore, the attestation does not *distinctly* state that the witness subscribed as the defendant's attorney, the instrument is invalid.⁵

§ 1115. Where, however, the attestation distinctly states the attesting solicitor to be the defendant's solicitor, the instrument will be valid.⁶

§ 1116. Where the person executing a warrant of attorney, or cognovit, is *himself a solicitor*, he may dispense with the presence of another solicitor on his behalf; for solicitors being expressly selected to impart information to others respecting the nature of

¹ Taylor v. Nicholls, 1840, 9 L. J. Ex. 78; Oliver v. Woodroffe, 1839, 4 M. & W. 650; Joel v. Dicker, 1847, 16 L. J. Q. B. 359.

² Bailey v. Bellamy, 1841, 10 L. J. Q. B. 41. See ante, § 1052.

³ Levinson v. Syer, 1852, 21 L. J. Q. B. 16.

⁴ Hibbert v. Barton, 1842, 12 L. J. Ex. 70.

⁵ See invalid forms in Poole v. Hobbs, 1839, 8 Dowl. 113; recognised in Everard v. Poppleton, 1843, as reported 5 Q. B. 184. See, also, Potter v. Nicholson, 1841, 10 L. J. Ex. 311; Everard v. Poppleton, 1843, 13 L. J. Q. B. 1; Lucey v. Murphy, 1873, 1r. R. 7 C. L. 494;

Hibbert v. Barton, 1842, 12 L. J. Ex. 70. See, also, Pocock v. Pickering, 1852, 21 L. J. Q. B. 365; Elkington v. Holland, 1842, 9 M. & W. 659.

⁶ See examples of valid forms in Lewis v. Lord Kensington, 1846, 15 L. J. C. P. 100; Phillips v. Gibbs, 1846, 16 L. J. Ex. 48; Gay v. Hill, 1849, 18 L. J. Q. B. 12; Nolan v. Gumley, 1863, 14 Ir. C. L. R. 301; Lindley v. Girdler, 1843, 13 L. J. Q. B. 53; Knight v. Hasty, 1843, 12 L. J. Q. B. 293; recognised in Everard v. Poppleton, 1843, as reported 5 Q. B. 183. See, further, Ledgard v. Thompson, 1843, 12 L. J. Ex. 229.

these instruments, are presumed to require no advice on such a subject ; as they are consequently not within the mischief of the statute, its provisions do not apply to them.¹

§§ 1116—
1119.

§ 1116A. The Act extends to warrants of attorney executed abroad, and sought to be enforced in this country, since the evil, which is intended to be remedied, affects such instruments, equally with those which are executed at home.² The Legislature, apparently by an oversight, has drawn a distinction between warrants of attorney and cognovits ; the Act applying equally to all the latter class of instruments, but being confined to such of the former class as relate to personal actions. The result is, that if a defendant in an action to recover land gives a warrant of attorney to confess judgment, no statutory execution is required ;³ but if he gives a cognovit for the same purpose, it will be set aside unless duly attested in conformity with the Act.⁴

§§ 1117–18. The above provisions were made exclusively for the benefit of defendants, and therefore third parties, even though prejudiced by them, cannot object to warrants of attorney, or cognovits, given by their debtors on the ground that no solicitor attested their execution.⁵ Even a surety cannot get a judgment entered up on a warrant of attorney executed by a principal and his sureties, set aside on the ground that the warrant was irregularly executed.⁶

§ 1119. In conclusion, a few of the principal statutes, which either require or permit the *enrolment* or registration of particular instruments, may be properly noticed.⁷ Amongst others of these, the Mortmain and Charitable Uses Act, 1888,⁸ enacts that all conveyances to charitable uses shall be void, unless, among other formalities,⁹ they be enrolled in the Central Office of the Supreme Court of Judicature,¹⁰ “ within six calendar months next after the

¹ Chipp v. Harris, 1839, 9 L. J. Ex. 64 ; Downes v. Garbutt, 1843, 14 L. J. Q. B. 216.

² Davis v. Trevanion, 1845, 14 L. J. Q. B. 138.

³ Doe v. Kingston, 1841, 1 Dowl. N. S. 203.

⁴ Doe v. Howell, 1840, 12 A. & E. 696.

⁵ Chipp v. Harris, 1839, 9 L. J. Ex. 64. See Pinches v. Harvey,

1841, 10 L. J. Q. B. 316.

⁶ Price v. Carter, 1845, 7 Q. B. 838.

⁷ As to the general mode of proof of enrolments, see post, §§ 1646 and 1647.

⁸ 51 & 52 V. c. 42, § 4, sub-s. 1.

⁹ See ante, § 1110.

¹⁰ 42 & 43 V. c. 78, § 5 ; R. S. C. 1883, Ord. LXI. r. 1.

§§ 1119— making of the assurance of the land.”¹ This enactment, how-
 1120a. ever, does not apply to any conveyance or assurance of lands, &c., to or in trust for the overseers of the poor, or the guardians of any parish or union, for the purpose of providing a workhouse or asylum for the accommodation of the poor.² Another important Act rendering enrolment necessary is the Clerical Disabilities Act, 1870,³ which contains some special provisions for enrolling deeds of relinquishment executed by parsons.⁴ Enrolment of title to land, upon sale, is now necessary under the Land Transfer Act, 1897,⁵ in those counties or parts of counties to which the Act has been applied by Orders in Council.

§ 1120. An old Act⁶ required every bargain and sale passing an estate of inheritance, or freehold in any lands, tenements, or hereditaments, by deed, to be enrolled within six months next after its date, either in the Enrolment Department of the Central Office,⁷ or in the county where the land lies, before the *custos rotulorum*, and two justices, and the Clerk of the Peace, or any two of them, the Clerk of the Peace being one.⁸ The necessity for enrolment under this Act was, however, soon obviated by the device of conveying the property by means of a lease and a release, neither of which required enrolment under the Act, the necessity for which cumbersome procedure was in its turn in time dispensed with by statute.⁹ The Act, however, still remains in force, and enrolment under its provisions is still occasionally adopted.¹⁰

§ 1120A. With the view of preventing frauds upon creditors by the secret transfer of personal property, various Acts also render void¹¹ every warrant of attorney to confess judgment in any personal action, every *cognovit actionem* given by any person, every judge's order made by consent, and given by a defendant

¹ As to proof of such enrolment, see post, § 1650.

² 7 & 8 V. c. 101 (“The Poor Law Amendment Act, 1844”), § 73.

³ 33 & 34 V. c. 91.

⁴ As to proof of the executing and enrolment of such a deed, see post, § 1653.

⁵ 60 & 61 V. c. 65, post, § 1125A.

⁶ 27 H. 8, c. 16; extended to counties palatine by 5 E. c. 26.

⁷ As to proof of such enrolment,

see post, § 1649.

⁸ 42 & 43 V. c. 78, § 5; R. S. C. 1883, Ord. LXI. r. 1.

⁹ 4 & 5 V. c. 21; 8 & 9 V. c. 106, § 2.

¹⁰ By stat. 10 Anne, c. 18, § 3, an office copy of the enrolment is made as good evidence as the original deed.

¹¹ See *Acraman v. Herniman*, 1851, 20 L. J. Q. B. 355; *Farrow v. Mayes*, 1852, 18 Q. B. 516; *Bryan v. Child*, 1850, 19 L. J. Ex. 264.

in a personal action, authorising the plaintiff to sign judgment, or issue execution,¹ and every bill of sale of personal chattels,² —which phrase, it may be noted in passing, will now include fixtures and growing crops when separately assigned or charged,³ —unless within twenty-one days after the security or the consent has been given, in the case of a warrant, cognovit, or judge's order, or within seven days after execution in the case of a bill of sale,⁴ the instrument, or a true copy thereof,⁵ be filed, together with an affidavit⁶ of the time when it was executed or given, in the Bills of Sale Department of the Central Office.⁷

§ 1121. All deeds and instruments, whereby any estates or hereditaments shall be purchased, sold, leased, charged, or exchanged under the authority of any Act relating to the possessions and land revenues of the Crown, must be enrolled, within six months after their several dates, in the office of Land Revenue Records and Enrolments.⁸ Similar enactments are contained in the statutes which respectively relate to the possessions of the Duchy of Cornwall,⁹ and to the possessions of Her Majesty in respect of the Duchy of Lancaster;¹⁰ but the instruments requiring enrolment under these Acts must be enrolled in the offices of the respective duchies.¹¹

¹ 32 & 33 V. c. 62, §§ 26, 27; 3 G. 4, c. 39, §§ 1—3; 6 & 7 V. c. 66. For the corresponding Irish enactments, see 3 & 4 V. c. 105 ("The Debtors (Ireland) Act, 1840"), § 12 (Ir.); 20 & 21 V. c. 60, §§ 334, 335 (Ir.).

² 45 & 46 V. c. 43, § 8. For a somewhat corresponding Irish enactment, see 42 & 43 V. c. 50, § 8 (Ir.); and 46 V. c. 7, § 8 (Ir.).

³ 41 & 42 V. c. 31, §§ 4, 5; 42 & 43 V. c. 50, § 4 (Ir.); 46 V. c. 7, § 6 (Ir.). As to the old law so far as it related to growing crops, see *Branton v. Griffiths*, 1877, 2 C. P. D. 212 (C. A.).

⁴ The registration of every bill of sale must now be renewed every five years, under the authority of 41 & 42 V. c. 31, § 11; 42 & 43 V. c. 50, § 11 (Ir.).

⁵ The omission of the name of the grantor and of the addresses of the attesting witnesses in the copy plea, these particulars being contained in the affidavit filed with such copy,

has been held not to render the bill of sale void: *Coates v. Moore*, [1903] 2 K. B. 140 (C. A.).

⁶ As to what the affidavit must contain, see *Jones v. Harris*, 1871, L. R. 7 Q. B. 157; *Murray v. Mackenzie*, 1875, L. R. 10 C. P. 625; *Blount v. Harris*, 1879, 48 L. J. Q. B. 159 (C. A.); *Castle v. Downton*, 1879, 5 C. P. D. 56, and cases there cited.

⁷ 42 & 43 V. c. 78, § 5; R. S. C. 1883, Ord. LXI. r. 1. As to proof of the various matters mentioned in this section, see post, § 1654.

⁸ 10 G. 4, c. 50, § 63 ("The Crown Lands Act, 1829"); 2 W. 4, c. 1 ("The Crown Lands Act, 1832"), § 21; 14 & 15 V. c. 42 ("The Crown Lands Act, 1851"), § 6.

⁹ 26 & 27 V. c. 49, §§ 30—33; 7 & 8 V. c. 65, §§ 30—36; 11 & 12 V. c. 83, § 6.

¹⁰ 11 & 12 V. c. 83, § 14.

¹¹ As to proof of such enrolments, see post, § 1648.

§§ 1122—
1126.

§ 1122. The Fines and Recoveries Act,¹ 1883, enacts,² that no assurance, by which any disposition of lands shall be effected under that Act by a tenant in tail, except a lease not exceeding twenty-one years at a rent not less than five-sixths of a rack-rent, shall have any operation by virtue of the Act, unless it be enrolled in what is now called the Enrolment Department of the Central Office³ within six calendar months after its execution; while § 46 provides, that the consent of a protector to the disposition of a tenant in tail shall, if given by a distinct deed, be void, unless the deed be enrolled either at or before the time when the assurance by the tenant in tail shall be enrolled.⁴

§ 1125. A clause in the Judgments Act, 1855,⁵ enacts, in substance, that no annuity or rent-charge, otherwise than by marriage settlement,⁶ for life or lives, or for any term or estate determinable on life or lives, shall affect any hereditaments as to purchasers, mortgagees, or creditors, unless a memorandum containing the name, residence, and description of the person whose estate is intended to be affected, and the date of the instrument, and the annual sum payable, be left for registration in the Enrolment Department of the Central Office.⁷ Notwithstanding the language of this enactment, the Court of Appeal has held that an unregistered annuity-deed may still be enforced as against a subsequent incumbrancer or purchaser who may have taken with notice of its existence.⁸

§ 1126. The written contract between the articted clerk and the solicitor to whom he is bound, must be enrolled with the Registrar of Solicitors,⁹ within six months after its date.¹⁰

¹ 3 & 4 W. 4, c. 74.

² § 41.

³ See 42 & 43 V. c. 78, § 5; R. S. C. 1883, Ord. LXI. r. 1.

⁴ See also §§ 49, 51, 52, and 59 of 3 & 4 W. 4, c. 74, for further provisions respecting enrolment. As to proof of such enrolment, see post, § 1650A.

⁵ 18 & 19 V. c. 15, § 12.

⁶ Annuities and rent-charges given by will are also excluded from the provision. See § 14 of the Act.

⁷ The words of the Act are, "with the senior Master of the Court of Common Pleas." As to how enrolment of annuity deeds is proved, see post, § 1651.

⁸ Greaves v. Tofield, 1880, 14 Ch. D. 563 (C. A.); diss. Jessel, M.R., dubitante Bramwell, L.J.

⁹ "The Solicitors Act, 1888" (51 & 52 V. c. 65), § 7.

¹⁰ By § 8, the enrolment may, subject to certain conditions, be made after six months.

§ 1126A. The Land Transfer Act, 1875,¹ with the object of §§ 1126a, simplifying the title to, and facilitating the transfer of land, established a land registry, and provided that any person who 1127. has contracted to buy, or is entitled for his own benefit to, or is capable of disposing for his own benefit of, an estate in fee simple in land, may apply to the registrar to be registered as proprietor of such land with either an absolute or possessory title, and upon satisfying the registrar as to the title proposed to be registered,² to be registered accordingly, and to have a land certificate, showing his title, granted to him. Registration with an absolute title confers upon the person registered a statutory estate in fee simple,³ and registration with a possessory title confers a similar estate subject to rights and interests existing at the time of first registration.⁴ Leasehold land held under a lease for a life or lives, or determinable on a life or lives, or for a term of which more than twenty-one years are unexpired may similarly be registered. Notwithstanding the advantages accruing from registration under the Act it has been but little adopted in practice; now however by the Land Transfer Act, 1897,⁵ it is provided that it may be declared by Order in Council that registration of title to land in any specified county or part of a county mentioned in the Order, is to be compulsory on sale, and thereupon a person shall not, under any conveyance on sale executed on or after the day specified, acquire the legal estate in any freehold land in that county or part of a county, unless or until he is registered as proprietor of the land.⁶ At present registration on sale has only been so rendered compulsory in the county of London.⁷

§ 1127. Other statutes which *permit*⁸ enrolments to be made,

¹ 38 & 39 V. c. 87, "amended by The Land Transfer Act, 1897" (60 & 61 V. c. 65). These Acts do not apply to Scotland or Ireland.

² *Id.*, § 6, as to estates in fee simple, §§ 12—15 as to leaseholds. See also Land Transfer Rules, 1898.

³ *Id.*, § 7.

⁴ *Id.*, § 8.

⁵ 60 & 61 V. c. 65, amending the Act of 1875 in various particulars.

⁶ *Id.*, § 20. The provision that a person shall not under a conveyance

on sale acquire the legal estate, unless and until he is registered as proprietor, is limited to the first registration, and after the land is once upon the register an unregistered disposition will pass the property in the land, but will be liable to be defeated by a subsequent registered transfer: *Capital and Counties Bank v. Rhodes*, [1903] 1 Ch. 631.

⁷ By Orders in Council, 18 July, 1898, and 20 October, 1898.

⁸ See *Agra Bk. v. Barry*, 1874,

§ 1127. are first, the Yorkshire Registries Act;¹ secondly, the Act² applicable to the registration of lands in Middlesex; thirdly, the Act which governs the registration of deeds, &c., in Ireland;³ fourthly, the Charitable Trusts Act, 1855, allowing enrolments of any deed, will, or document relating to any charity, in the office of the Charity Commissioners, and subsequent proof thereof by copies certified under the hand of the secretary or one of the Commissioners;⁴ and fifthly, the Act⁵ remedying defective titles to certain inclosures,—after reciting that by divers Acts of Inclosure the awards of the Commissioners were required to be enrolled, but that such enrolments have in many instances been omitted,—enacts, that the awards not enrolled shall still be valid, but that the parties interested may enrol them if they think proper.⁶

L. R. 7 H. L. 155 (H. L.); and *In re Lambert's Estate*, 1884, 13 L. R. Ir. 234 (C. A.), as to the prejudicial results which may occur by omitting to register an instrument capable of registration in a registry county.

¹ 47 & 48 V. c. 54; see especially § 51; and see also notes, post, to §§ 1645, 1648, 1654, and 1840. As to proof of the enrolment, see § 1652A. Under the former Acts, for which this Act is now substituted, where there was a contest as to priority between a registered and unregistered mortgage, even though they were not under seal, and therefore only equitable charges, a registered charge had the priority over an unregistered one: *In re Wright's Mortgage Trust*, 1873, L. R. 16 Eq. 41; a further charge in favour of even a first mortgagee of land in the registry county requires registration. And see, also, *Chadwick v. Turner*, 1866, 35 L. J. Ch. 349, and *Credland*

v. Potter, 1874, L. R. 10 Ch. 8.

² Viz., 7 A. c. 20 ("The Middlesex Registry Act, 1708"), amended by "The Land Registry (Middlesex Deeds) Act, 1891" (54 & 55 V. c. 10), by which the duties of the Middlesex Registry have been transferred to the Land Registry. An instrument charging lands in Middlesex, though it be not a deed, ought to be registered: *Neve v. Pennell*, 1863, 2 New R. 508; *Moore v. Culverhouse*, 1860, 29 L. J. Ch. 419. See last note; and as to proof of enrolment, post, § 1652B.

³ 6 A. c. 2, Ir., on the construction of which see *Carlisle v. Whaley*, 1867, L. R. 2 H. L. 391; and see as to Irish judgments as to mortgages, post, § 1652.

⁴ 18 & 19 V. c. 124, § 42. As to proof of the enrolment, see post, § 1650.

⁵ 3 & 4 W. 4, c. 87, §§ 1 and 2.

⁶ As to proof of the enrolment, see post, §§ 1646 and 1647.

CHAPTER IV.

ADMISSIBILITY OF PAROL EVIDENCE TO AFFECT WRITTEN
INSTRUMENTS.

§ 1128. THE *admissibility of extrinsic parol testimony to affect written instruments* is, perhaps, the most difficult branch of the law of evidence. In discussing the law as to this, one or two established principles, which govern the interpretation of all writings, may be mentioned. First, parol evidence is admissible to show under what surrounding *circumstances* an instrument was executed;¹ next, in order to put a just construction upon any document, the court must *read the whole* of it, and determine the meaning of the words employed in any passage, not only by a careful examination of the immediate context, but also by considering the sense in which the same words have been used in other parts of the instrument.² The language of a particular passage may clearly bear a wider or narrower signification, when read in connexion with other parts of the instrument where the same language is employed, than it would have borne had no such reflected light been thrown upon it. As Lord Cairns forcibly put it, the writer of the instrument has often himself “made us a dictionary” by which to read it.³ For instance, suppose a question respecting the meaning of the word “close,” as used in a will. If this expression only occurs once, evidence is admissible to show that, in the country where the property is situate, it denotes a farm: if, however, the word be found in other parts of the will, in any one of which this enlarged meaning cannot be applied to it, such evidence will be rejected, as the court can see that the testator

§ 1128.

¹ *Grahame v. Grahame*, 1887, 19 L. R. Ir. 249, post, § 1194.

² *Blundell v. Gladstone*, 1841, 12 L. J. Ch. 225; *Bateman v. Id. Roden*, 1844, 1 Jones & Lat. 356 (Ir.).

³ *Hill v. Crook*, 1873, L. R. 6 H. L. 265; adopted by Jeune, Pres.; In the goods of Ashton, 1892, P. 83. And see *Grant v. Grant*, 1869, L. R. 2 P. & D. 8; and post, § 1195.

§§ 1128— used the word in its ordinary sense, as denoting an enclosure.¹
 1130. Similar principles have been applied to interpret the words “nephews and nieces;”² “relatives,” “cousins,”³ and “children.”⁴ Similarly, the context may show the word “month,” which usually in law denotes a lunar month, to mean a calendar month.⁵ In like manner, when ambiguous words are used in the operative part of a deed, the recitals and other parts of the instrument furnish an excellent test for discovering the real intention and fixing their true meaning.⁶

§ 1129. Again on a question whether a legacy, given by a codicil to a legatee under the will, is cumulative or substitutionary, the court may look, not only to other parts of the same codicil, but to bequests in other later testamentary instruments. If, for instance, it should appear that, in these later codicils, the testator had used the words “in addition,” when making bequests to other parties which were intended to be cumulative, the absence of these words, or of equivalent expressions, in the legacy in question, would be a circumstance far short, indeed, of conclusive, but tending to show, in connexion with other facts and arguments, that the later legacy was intended not to be additional but in substitution. The court, in such case, would carry back and apply to the first codicil the knowledge acquired by examining the language of the later bequests.⁷

1130.⁸ If an instrument consist partly of a printed formula, and partly of written words, and any reasonable doubt is felt⁹ as to the meaning of the whole, *written words have greater effect* in the interpretation than those which are printed.¹⁰ The written words are the immediate language selected by the parties them-

¹ Richardson v. Watson, 1833, 4 B. & Ad. 787.

² Grant v. Grant, 1869, supra; Miles v. Wilson, [1903] 1 Ch. 138 (Swinfen Eady, J.).

³ Seale-Hayne v. Jodrell, [1891] A. C. 304 (H. L.); Re Blower's Trusts, 1871, L. R. 11 Eq. 97; In the goods of Ashton, [1892] P. 83.

⁴ Daniel v. Platt, 1892, 40 W. R. 475.

⁵ Lang v. Gale, 1813, 1 M. & Sel. 111; R. v. Chawton, 1841, 10 L. J. M. C. 55. See ante, § 16.

⁶ Walsh v. Trevanion, 1850, 19 L. J. Q. B. 458; Pallikelagatha Marcar v. Sigg, 1880, L. R. 7 Ind. App. 83, 100 (P. C.).

⁷ Lee v. Pain, 1844, 14 L. J. Ch. 346; Russell v. Dickson, 1842, 2 Dr. & War. 139; Darley v. Martin, 1853, 22 L. J. C. P. 249.

⁸ Gr. Ev. § 278, almost verbatim.

⁹ But not otherwise. See The Nifa, [1892] P. 411; Scrutton v. Childs, 1877, 36 L. T. 212.

¹⁰ This rule is embodied in the N. York Civ. Code, § 1695.

selves for the expression of their meaning ; but the *printed formula* is simply general, applying not only to the particular case, but to that of all other similar contracts.¹

§§ 1130,
1131.

§ 1131. Next, the terms of every document must, in the absence of all parol testimony, be construed in their *primary* sense, unless the context evidently points out that they need, in the particular instance, in order to effectuate the immediate intention of the parties, to be understood in some other and peculiar sense.² The question, what is the primary sense of a word? is often more easily asked than answered.³ Generally, if the language be technical or scientific, and be used in a matter relating to the art or science to which it belongs, its technical or scientific must be considered its primary meaning;⁴ but expressions having reference to the common transactions of life will be interpreted according to

¹ Robertson v. French, 1803, 4 East, 136; Gumm v. Tyrie, 1864, 33 L. J. Q. B. 108. See Jessel v. Bath, 1867, L. R. 2 Ex. 267. In America it has, with apparent inconsistency, been held that if a letter refer to a verbal contract, the terms of such verbal contract may be shown, even though they are inconsistent with the letter (Holt v. Pie, 1888, 120 Pa. St. 439 (Am.)); but that if a contract refer to a plan which is inconsistent with it, the contract itself will prevail: Smith v. Flanders, 1880, 129 Mass. 322 (Am.).

² Robertson v. French, 1803, 4 East, 130; Mallan v. May, 1844, 14 L. J. Ex. 48; Carr v. Montefiore, 1864, 33 L. J. Q. B. 256; Ford v. Ford, 1848, 6 Hare, 490; Hicks v. Sallitt, 1854, 23 L. J. Ch. 571; Boorman v. Johnston, 1834, 12 Wend. 573 (Am.). See, also, Rhodes v. Rhodes, 1882, 7 App. Cas. 112 (P. C.); Gray v. Pearson, 1851, 6 H. L. C. 106; Abbott v. Middleton, 1858, 28 L. J. Ch. 110; Slingsby v. Grainger, 1859, 7 H. L. C. 283; Wing v. Angrave, 1860, 8 H. L. C. 183; Gordon v. Gordon, 1871, L. R. 5 H. L. 254; Ex parte Walton, re Levy, 1881, 17 Ch. D. 756. See Bathurst v. Errington, 1877, 2 App. Cas. 698; Holt v. Collyer, 1881, 16 Ch. D. 718. Accordingly, evidence that the parties only meant that it had not lapsed by non-payment of

certain patent fees is not admissible to qualify a covenant that a patent "is in full force and effect": Chemical Electric Light, &c. Co. v. Howard, 1890, 150 Mass. 496 (Am.). And where a contract is for "half" of certain property, it cannot be shown by parol evidence that the parties really meant less than half: Butler v. Gale, 1855, 27 Vern. 789 (Am.). If it be doubtful whether a word is used in its ordinary sense or not, it is for a jury to say how this is: Simpson v. Margetson, 1847, 17 L. J. Q. B. 81.

³ See Doe v. Perratt, 1843, 6 M. & Gr. 343, where the judges differed whether the word "heir" in a will was to be construed in its technical or popular sense. See, also, Wells v. Wells, 1874, L. R. 18 Eq. 504, where Jessel, M.R., held, in opposition to some authorities, that "nephew" meant blood nephew, and did not include the son of a husband's sister. This, however, appears to depend in every case upon the particular will and the evidence; no hard and fast rule can be laid down: Miles v. Wilson, [1903] 1 Ch. 138 (Swinfen Eady, J.). See, also, Merrill v. Morton, 1881, 17 Ch. D. 382, and cases cited supra, § 1128.

⁴ Shore v. Wilson, 1842, 9 Cl. & Fin. 355, 525 (H. L., Coleridge, J.); Doe v. Perratt, 1843, 6 M. & Gr. 343 (Parke, B.).

§ 1131. their plain, ordinary, and popular meaning.¹ Evidence that expressions were used in a technical sense ought not to be admitted

¹ *Robertson v. French*, 1803, 4 East, 130; *Shore v. Wilson*, 1842, 9 Cl. & Fin. 355, 565 (H. L., Tindal, C.J.). Evidence is admissible to show that expressions used in a will had acquired appropriate meaning, either generally, or by local usage, or amongst particular classes; and where any doubt arises upon the true sense and meaning of the words themselves, or any difficulty as to their application under surrounding circumstances, the sense and meaning of the language may be ascertained by evidence outside the instrument: In *re Rayner*, [1904] 1 Ch. 176 (per Vaughan Williams, L.J.). The rules for the interpretation of wills laid down in *Wigram* may be safely applied, *mutato nomine*, to all other private instruments, and are, as the result both of principle and authority, expressed in the following seven propositions:—"I. A testator is always presumed to use the words, in which he expresses himself, according to their strict and primary acceptation, unless from the context of the will it appears that he has used them in a different sense; in which case the sense, in which he thus appears to have used them, will be the sense in which they are to be construed. II. Where there is nothing in the context of a will, from which it is apparent that a testator has used the words, in which he has expressed himself, in any other than their strict and primary sense, and where his words so interpreted are *sensible with reference to extrinsic circumstances*, it is an inflexible rule of construction, that the words of the will shall be interpreted in their strict and primary sense, and in no other, although they may be capable of some popular or secondary interpretation, and although the most conclusive evidence of intention to use them in such popular or secondary sense be tendered. III. Where there is nothing in the context of a will, from which it is apparent that a testator has used the words, in which he has expressed himself, in any other than their strict and primary sense, but

his words so interpreted are *insensible with reference to extrinsic circumstances*, a court of law may look into the extrinsic circumstances of the case to see whether the meaning of the words be sensible in any popular or secondary sense, of which, *with reference to these circumstances*, they are capable. IV. Where the characters in which a will is written are difficult to be deciphered, or the language of the will is not understood by the court, the evidence of persons skilled in deciphering writing, or who understand the language in which the will is written, is admissible to declare what the characters are, or to inform the court of the proper meaning of the words. V. For the purpose of determining the object of a testator's bounty, or the subject of disposition, or the quantity of interest intended to be given by his will, a court may inquire into every *material* fact relating to the person who claims to be interested under the will, and to the property, which is claimed as the subject of disposition, and to the circumstances of the testator and of his family and affairs; for the purpose of enabling the court to identify the person or thing intended by the testator, or to determine the quantity of interest he has given by his will. The same, it is conceived, is true of every other disputed point, respecting which it can be shown that a knowledge of extrinsic facts can in any way be made ancillary to the right interpretation of a testator's words. VI. Where the words of a will, aided by evidence of the material facts of the case, are insufficient to determine the testator's meaning, no evidence will be admissible to prove what the testator intended, and the will (except in certain special cases—see Proposition VII.) will be void for uncertainty. VII. Notwithstanding the rule of law, which makes a will void for uncertainty, where the words, aided by evidence of the material facts of the case, are insufficient to determine the testator's meaning—courts of law, in certain

without a distinct averment as to the particular words to which such evidence is proposed to be directed, and as to the precise technical or trade meaning which it is sought to attribute to them.¹

§§ 1131,
1132.

§ 1132. Bearing the above principles in mind, the leading general rule respecting the admissibility of extrinsic evidence to affect what is in writing is, that *parol testimony cannot be received to contradict, vary, add to, or subtract from, the terms of a valid written instrument.*² This common law rule may be traced back to a remote antiquity. It is founded on the inconvenience that might result, if matters in writing, made by advice, and on consideration, and intended finally to embody the entire agreement between the parties, were liable to be controlled by what Ld. Coke calls "the uncertain testimony of slippery memory."³ When parties have deliberately put their mutual engagements into writing, in language which imports a legal obligation, or, in other words, a complete contract,⁴ it is only reasonable to presume that they have introduced into the written instrument every material term and circumstance. Consequently, all parol testimony of conversations held between the parties, or of declarations made by either of them, whether before, or after, or at the time of, the completion of the contract, will be rejected; because such evidence, while deserving far less credit than the writing itself, would inevitably tend, in many instances, to substitute a new and different contract for the one really agreed upon, and would thus,

special cases, admit extrinsic evidence of *intention*, to make certain the *person* or *thing* intended, where the description in the will is insufficient for the purpose. These cases may be thus defined: where the object of a testator's bounty, or the subject of disposition (i.e. *person* or *thing* intended) is described in terms, which are applicable indifferently to more than one *person* or *thing*, evidence is admissible to prove which of the persons or things so described was intended by the testator": Wigr. Wills, 10—13.

¹ Sutton v. Ciceri, 1890, 15 A. C. 144 (Ld. Watson).

² Goss v. Ld. Nugent, 1833, 5 B. & Ad. 64; Wigr. Wills, 5; 2 Ph. Ev.

339; Huxtable, In re, [1902] 2 Ch. 793. So, by the Scotch law, "a writing cannot be cut down or taken away by the testimony of witnesses": Tait Ev. (Sc.) 326, 327; 1 Dickson, Ev. 92, et seq., 118; Inglis v. Buttery, 1878, 3 App. Cas. 552 (H. L. Sc.). See American authorities collected in note to § 275 of 15th edit. (1892) of Greenleaf on Evidence, at pp. 372-3. The rule applies to all records of judgments or official proceedings. See Id.

³ Lady Rutland's case, 1604-5, 5 Co. Rep. 54 a.

⁴ See Johnson v. Appleby, 1874, 43 L. J. C. P. 146.

§§ 1132—without any corresponding benefit, work infinite mischief and
1134. wrong.¹

§ 1133. Apart from all considerations of convenience, positive enactment has imposed the same rule² in several cases. It has, by requiring certain transactions to be evidenced by writing,—as, for instance, wills, contracts within the Statute of Frauds, and the like,³—rigidly excluded all parol testimony tending to vary the terms contained in the written instrument.⁴ The statutory rule will perhaps be more strictly enforced than that which rests on the common law alone, because, in the former case, to relax the rule in any degree, is to the like extent to repeal the particular Act which renders the writing necessary.⁵ The term, “written instrument,” for this purpose, includes not only records, deeds, wills, and other instruments required by statute or common law to be in writing, but every document which contains the terms of a *contract* between different parties, and is designed to be the repository and evidence of their final intentions.⁶

§ 1134. To less formal documents than those above-named the rule⁷ does not extend. Therefore, except in some few special cases,⁸ a receipt, so far as it is a mere *admission*,⁹ is not conclusive evidence of the payment therein acknowledged, but the party signing it may invalidate it by oral evidence of fraud, or of mistake or surprise on his part; for the document amounts only to *prima facie* proof, and is capable of being explained;¹⁰ an order

¹ *Preston v. Merceau*, 1775, 2 W. Bl. 1249; *Rich v. Jackson*, 1794, 4 Bro. C. C. 519 (Ld. Thurlow); *Adams v. Wordley*, 1836, 1 M. & W. 374; *Partridge v. Powlet*, 1742, 2 Atk. 383 (Ld. Hardwicke); *Bogert v. Cauman*, 1807-51, Anthon, R. 70 (Am.); *Bayard v. Malcolm*, 1806, 1 Johns 467 (Am.) (Kent, C.J.).

² That set out in § 1132.

³ See ante, § 986 et seq.

⁴ *Wigr. Wills*, 4, 6—8, 125, 126.

⁵ *Wigr. Wills*, 4, 6—8, 125, 126; *Miller v. Travers*, 1832, 8 Bing. 250; *Doe v. Hiscocks*, 1839, 9 L. J. Ex. 27; *Clayton v. Ld. Nugent*, 1844, 13 M. & W. 205.

⁶ *Woolam v. Hearn*, 1802, 7 Ves. 218; *Shore v. Wilson*, 1842, 9 Cl. & Fin. 540 (Williams, J.); *Stackpole v. Arnold*, 1814, 11 Mass. 31 (Am.).

And see *Bank of Australia v. Palmer*, [1897] A. C. 540 (P. C.).

⁷ Set out, supra, § 1132.

⁸ See ante, §§ 96, 845.

⁹ But perhaps so far as (e.g., in a bill of lading) it is evidence of a *contract*, it cannot be contradicted. See *Stratton v. Rastall*, 1788, 2 T. R. 366; *Almer v. George*, 1808, 1 Camp. 392; and American authorities collected in *Greenleaf on Ev.* (15th edit.). § 305, p. 420.

¹⁰ *Farrar v. Hutchinson*, 1839, 9 A. & E. 641; *Skaife v. Jackson*, 1824, 3 B. & C. 421; *Lee v. Lanc. and Yorks. Rail. Co.*, 1871, L. R. 6 Ch. 527 (C. A.); *Wallace v. Kelsall*, 1840, 10 L. J. Ex. 12; *Fuller v. Crittenden*, 1832, 9 Conn. 406 (Am.); a fortiori other modes of payment may be shown, although the bill-

for goods, insufficient to satisfy the Statute of Frauds, or a loose memorandum, not intended to contain the terms of the contract, will not exclude parol evidence on the subject—so that where a defendant, having ordered goods by an unsigned letter, not mentioning any time for payment, and therefore not in itself sufficient to satisfy the Statute of Frauds, afterwards accepted the goods which the plaintiff forwarded to him with the invoice, in an action for their price, parol evidence was admitted to show that the goods were really supplied on a credit, which had not expired at the commencement of the suit ;¹ in an action for breach of warranty, where plaintiff had bought and paid for a horse on a verbal warranty by the defendant, and the defendant, shortly after the purchase was completed, gave him a paper in the following form :—“ Bought of A. B., a horse for 7*l.*—A. B.,”—the plaintiff was allowed to prove the warranty by parol evidence, the paper appearing to have been meant merely as a memorandum of the transaction, or an informal receipt for the money, not to contain the terms of the contract itself ;² where the hirer of a horse had, at the time of hiring, handed the owner a card, on which was written in pencil, “ six weeks at two guineas, W. H.,” the owner was permitted to prove by parol evidence, not indeed a different time of hiring or a larger rate of payment than those stated in the memorandum, but an additional term, namely, that all accidents occasioned by the shying of the horse should be at the hirer’s risk ;³ and on the sale of a chattel under the value of 10*l.* an auctioneer is not bound by the description of the article contained in an unsigned printed catalogue, but he may show that when the article was put up to auction he publicly stated in the purchaser’s hearing that the description was incorrect.⁴

§ 1135. The rule⁵ does not moreover prevent parties to a written contract from proving that, either contemporaneously or as a preliminary measure, they entered into a distinct oral

§§ 1134,
1135.

head of the account rendered says :
“ All bills to be paid to — and
receipted by him” : *Kershaw v.*
Kershaw, 1875, 119 Mass. 140 (Am.).

¹ *Lockett v. Nicklin*, 1848, 19
L. J. Ex. 403. See § 1151, post.

² *Allen v. Pink*, 1838, 7 L. J. Ex.
206.

³ *Jeffery v. Walton*, 1816, 1 Stark.
R. 267. For other instances, see
ante, § 406.

⁴ *Eden v. Blake*, 1845, 14 L. J.
Ex. 194. As to examinations of
prisoners, see ante, §§ 893, 894.

⁵ Set out in § 1132.

§ 1135. agreement on some *collateral* matter.¹ Still less, indeed, does the rule exclude evidence of an oral agreement, which amounts to a condition subject to which the written agreement has been entered into² and subject to which the performance of the written agreement is to depend.³ Again, the rule is not infringed by the admission (under proper pleading) of parol evidence, showing that the instrument is altogether *void*, or *never* had any *legal* existence or binding force, either by reason of forgery or fraud or of the illegality of the subject-matter, or for want of due execution and delivery.⁴ For instance, it may be shown by parol evidence that an instrument, apparently executed as a deed, had really been delivered simply as an escrow,⁵ or that a document

¹ *Lindley v. Lacey*, 1864, 34 L. J. C. P. 7; *Morgan v. Griffith*, 1871, L. R. 6 Ex. 70. See post, § 1147; also *Brady v. Oustler*, 1864, 33 L. J. Ex. 300; *Malpas v. Lond. & S. W. Ry. Co.*, 1866, L. R. 1 C. P. 336. Thus where a lease contains no reference to the drainage, evidence was admitted to prove a collateral warranty that the drains were in good order. *De Lassalle v. Guildford*, [1901] 2 K. B. 215 (C. A.), but such evidence is not admissible to enlarge the scope of a warranty which is contained in the written contract, *Lloyd v. Sturgeon Falls Pulp Co.*, 1901, 85 L. T. 162 (D.). An oral stipulation that an instrument is not to become binding unless and until some stipulation be first fulfilled may always be shown. See *Lindley v. Lacey*, 1864, 34 L. J. C. P. 7; *Wallis v. Littell*, 1861, 31 L. J. C. P. 100; *Morgan v. Griffith*, 1871, L. R. 6 Ex. 70. Where an instrument is not formal it may often be shown that some additional and supplementary agreement was made contemporaneously with the principal one. See *supra*, § 1134; and *Greenleaf* on Ev. 15th edit. 1892, § 304 and notes. Thus, in America, even a promissory note has been held not to be such a formal instrument as to prevent its being shown that at the time of its execution there was an agreement to pay "extra interest" beyond that named in it: *Rohan v. Hanson*, 1853, 11 Cush (Mass.) 446 (Am.). When an instrument is a

formal one it is often extremely difficult to say what is really "collateral" to it. Obviously, unless some restriction be imposed, the rule that parol evidence is not admissible to vary, &c. a written contract may be rendered altogether nugatory. It has been suggested in America that a matter ought not to be considered "collateral" to a formal instrument except where it is evident *from the writing itself* that such writing contains *part only*, and not the *whole*, of the agreement. See *Greenleaf* on Ev. 15th edit. (1892), § 284, and note thereto, at p. 384; see, also, *ibid.* § 89, and *De Lassalle v. Guildford*, cited *supra*. An order which is plainly a separate and distinct one from the subject-matter of the original contract is "collateral." See *Reid v. Battie*, 1829, M. & M. 414, and cases cited, post, § 1147.

² E.g., that a bill or mortgage was only to stand as security for certain moneys, or otherwise to show the real nature of a transaction; see *Trench v. Doran*, 1887, 20 L. R. Ir. 338.

³ *Lindley v. Lacey*, 1864, 34 L. J. C. P. 9.

⁴ *Gun v. McCarthy*, 1884, 13 L. R. Ir. 304; *Collins v. Blantern*, 1766-7, 2 Wils. 341; and cases cited in the notes to S.C. in 1 Smith, L.C.; *Paxton v. Popham*, 1808, 9 East 421.

⁵ *London Freehold and Leasehold Property Co. v. Suffield*, [1897] 2 Ch. 608 (C. A.); *Pattle v. Hornibrook*,

was really meant to be conditional on the happening of an event which had never occurred.¹ *Fraud* by the party relying upon the agreement, practised upon the other party in that which is the subject-matter of the claim, is, moreover, universally fatal to the claim. "The covin," says *Ld. Coke*, "doth suffocate the right."

§§ 1135,
1136.

§ 1136. This is so, whether the foundation of the claim be a record,² a deed, or a writing without seal; for in either case the instrument will be void—or, more correctly *voidable* at the option of the injured party,³—if obtained by fraud, and the fraud may be established by parol evidence.⁴ Thus if a person has been induced by verbal fraudulent statements to enter into a written contract for a purchase, he may, in an action for a deceitful representation, prove the fraud by evidence aliunde, though the written contract or the deed of conveyance is silent on the subject to which the fraudulent representations refer.⁵ Again the fraudulent representation of a vendor respecting the article sold, may be given in evidence, if the purchaser has thereby been prevented from discovering a fault which the vendor knew to exist.⁶ Moreover, the declarations of a testator are admissible to show his intentions, if the will be impeached on the ground of fraud, circumvention, or forgery;⁷ and similar evidence will be received with the view of rebutting the presumption, that an alteration, or interlineation, apparent on the face of the will,

[1897] 1 Ch. 25 (*Stirling, J.*); *Murray v. Ld. Stair*, 1823, 2 B. & C. 82.

¹ *Pym v. Campbell*, 1856, 25 L. J. Q. B. 277; *Davis v. Jones*, 1856, 25 L. J. C. P. 91. See, also, *Wallis v. Littell*, 1861, 31 L. J. C. P. 100; *Rogers v. Hadley*, 1863, 32 L. J. Ex. 41; *Gudgen v. Besset*, 1856, 26 L. J. Q. B. 36. The same doctrine applies to wills, though it must be used with very great caution: *Lister v. Smith*, 1863, 33 L. J. P. & M. 29.

² See post, § 1713.

³ *Urquhart v. Macpherson*, 1878, 3 App. Cas. 881 (P. C.); *Clarke v. Dickson*, 1858, 28 L. J. C. P. 225.

⁴ *Tait, Ev.* 327, 328; *Buckler v. Millerd*, 1689, 2 Ven. Tr. 107; *Filmer v. Gott*, 1774, 4 Bro. P. C.

230; *Robinson v. Ld. Vernon*, 1859, 29 L. J. C. P. 135; *Rogers v. Hadley*, 1863, 32 L. J. Ex. 241; *Taylor v. Weld*, 1809, 5 Mass. 116 (Am.); *Franchot v. Leach*, 1826, 5 Cowen, 508 (Am.); *Dorr v. Munsell*, 1816, 13 Johns, 431 (Am.); *Morton v. Chandler*, 1831, 8 Greenl. 9 (Am.); *Com. v. Bullard*, 1812, 9 Mass. 270 (Am.).

⁵ *Dobell v. Stephens*, 1825, 3 B. & C. 623; *Wright v. Crookes*, 1840, 1 Scott, N. R. 685; *Hotson v. Browne*, 1860, 30 L. J. C. P. 106.

⁶ *Kain v. Old*, 1824, 2 B. & C. 634.

⁷ *Doe v. Hardy*, 1836, 1 M. & Rob. 525; *Doe v. Allen*, 1799, 8 T. R. 147.

§§ 1136— was made after its execution.¹ For this last purpose, however, the declarations of the testator must have been made before the writing was executed, though it matters not whether the instrument be, or be not, a holograph will.²

1138.

§ 1137.³ Parol evidence may also (under a proper pleading) be given to show that the contract in writing not disclosing these was really made for objects forbidden, either by statute, or by common law;⁴ that such writing was obtained by improper means, such as duress;⁵ that the party was incapable of contracting by reason of some legal impediment, such as infancy, coverture,⁶ idiocy, insanity, or intoxication;⁷ or that the instrument came into the hands of the plaintiff without any absolute final delivery by the obligor or party charged.⁸

§ 1138. Parol evidence may also be given to show a want or failure of consideration, in the absence of which even an agreement, which is merely in writing, is not binding.⁹ When, however, an instrument is under seal, the seal is, in the absence of fraud, conclusive evidence of a sufficient consideration,¹⁰ and is strong presumptive evidence that the consideration stated is the

¹ *Doe v. Palmer*, 1851, 20 L. J. Q. B. 367; *In re Duffy*, 1871, Ir. R. 5 Eq. 506 (Ir.); *Dench v. Dench*, 1877, 2 P. D. 60.

² *Id.* See *In re Hardy*, 1861, 30 L. J. P. & M. 142; *Staines v. Stewart*, 1862, 31 L. J. P. & M. 10; *In re Ripley*, 1858, 1 S. & T. 268; *Johnson v. Lyford*, 1863, L. R. 1 P. & D. 546.

³ Gr. Ev. § 284, in part.

⁴ *Collins v. Blantern*, 1766-7, 2 Wils. 347; *Benyon v. Nettlefold*, 1850, 20 L. J. Ch. 186. See, also, *Biggs v. Lawrence*, 1789, 3 T. R. 454; *Waynell v. Reed*, 1794, 5 T. R. 600; *Doe v. Ford*, 1835, 3 A. & E. 649; *Sinclair v. Stevenson*, 1824, 1 C. & P. 582; *Norman v. Cole*, 1800, 3 Esp. 253.

⁵ 2 Inst. 482, 483; B. N. P. 172; 5 Com. Dig., Plead. 2, W. 18-23. It is difficult to say how far it is competent to show that a written contract, apparently complete, never really became a binding one, because it was not intended by the parties to be so until a condition precedent,

which is only shown by oral evidence, had been fulfilled, which has in fact never been completed, or that the signature to it was induced by a contemporaneous oral promise to this effect. In America, the result of the decisions appears to be that such evidence is admissible in cases where the witnesses are credible, distinctly remember the facts, and narrate the details exactly. See *Greenleaf on Ev.* 15th edit. (1892), § 284, and notes thereto, pp. 381-2. See, also, ante, note to § 1135.

⁶ 2 Inst. 482, 483; B. N. P. 172; 5 Com. Dig., Plead. 2, W. 18-23.

⁷ B. N. P. 172; *Barrett v. Buxton*, 1826, 2 Aik. 167 (Am.).

⁸ B. N. P. 172; *Clark v. Gifford*, 1833, 10 Wend. 310 (Am.); U. S. v. *Leffler*, 1837, 11 Pet. 86 (Am.).

⁹ *Foster v. Jolly*, 1835, 1 C. M. & R. 707; *Solly v. Hinde*, 2 C. & M. 516; *Abbott v. Hendricks*, 1840, 1 M. & Gr. 791; ante, § 1023.

¹⁰ Ante, § 86.

true consideration.¹ If no consideration, or a mere nominal consideration, be stated in a deed, the party will be allowed to prove a real substantial consideration by extrinsic evidence;² and if such deed is expressed to be made "for divers good considerations," it may be averred and proved by parol that the bargainee gave money for his bargain.³ The onus, however, of proving the consideration will, in such a case, lie on the party claiming under the deed; for the mere statement in the instrument that it was made for valuable consideration will not suffice to raise a presumption that any substantial consideration was, in fact given.⁴ When, moreover, an instrument *under seal* specifies any particular consideration, such as love and affection, omitting all mention of any other, in general no extrinsic proof of another can be given, because it would contradict the deed.⁵ This rule, however, never applies at all to instruments merely written.⁶ And it does not even apply to instruments under seal where the object is to establish or negative the existence of fraud.⁷

§ 1139. Parol evidence will sometimes be admitted upon equitable grounds, to contradict or vary a writing, which, by some *mistake in fact*,⁸ speaks a different language from what the parties intended, and it would consequently be unjust to enforce it according to its expressed terms. In all such cases, however, the party seeking relief undertakes a task of great difficulty, since the court must be clearly convinced by the most satisfactory evidence, first, that the mistake complained of really exists, and next, that it is such a mistake as ought to be corrected.⁹ A *plaintiff* may seek this relief either by commencing

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¹ *Barton v. Bank of New South Wales*, 1890, 15 App. Cas. 379 (P. C.).

² *Leifchild's case*, 1865, L. R. 1 Eq. 231; *Peacock v. Monk*, 1748, 1 Ves. sen. 128.

³ 2 Ph. Ev. 347; *Tull v. Parlett*, 1829, M. & M. 472 (Tindal, C.J.).

⁴ *Kelson v. Kelson*, 1853, 22 L. J. Ch. 745.

⁵ *Peacock v. Monk*, 1748, 1 Ves. sen. 128 (Ld. Hardwicke); cited by *Alderson, B.*, in *Gale v. Williamson*, 1841, 10 L. J. Ex. 446. But see *Clifford v. Turrell*, 1841, 14 L. J. Ch. 390.

⁶ *In re Barnstaple Second Annuity*

Society, 1884, 50 L. T. 424.

⁷ *Filmer v. Gott*, 1774, 7 Bro. P. C. 70; cited by *Ld. Kenyon* in *R. v. Scammonden*, 1789, 3 T. R. 475; *Gale v. Williamson*, 1841, 10 L. J. Ex. 446; *Pott v. Todhunter*, 1845, 2 Coll. 76. See 13 E. c. 5.

⁸ See *Hunt v. Rousmanier*, 1823, 8 Wheat. 211 (Am.); *Price v. Ley*, 1863, 32 L. J. Ch. 530.

⁹ *M. of Townsend v. Strangroom*, 1801, 6 Ves. 339; *Mortimer v. Shortall*, 1842, 2 Dru. & War. 371; *Bold v. Hutchinson*, 1855, 24 L. J. Ch. 285; *Wright v. Goff*, 1856, 25 L. J. Ch. 803; *Ashurst v. Mill*, 1848,

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an action to *reform* the writing, in which it will be necessary (except under very special circumstances¹), and except when he establishes fraud or misrepresentation amounting to fraud on the part of the defendant,² to satisfy the court that the mistake was made on *both* sides³—or he may take proceedings to *rescind* the instrument,—in which case conclusive proof of error or surprise on the plaintiff's part alone will suffice,⁴ but it must appear that the mistake was one of vital importance.⁵ Which-ever form of relief be sought, if the defendant deny the case set up by the plaintiff, and the latter simply relies on verbal testimony, and has no documentary evidence,—such for instance, as a rough draft of the agreement, the written instructions for preparing it, or the like,—the plaintiff's position will be well-nigh desperate; though even here, as it seems, the parol evidence may be so conclusive in its character as to justify the court in granting the relief prayed.⁶

§ 1140. A *defendant*, against whom a specific performance of a written agreement is sought, may also insist upon the existence of a mistake in the writing, and establish this by parol, relying on any matter showing it to be inequitable to enforce the contract.⁷

7 Hare, 502; Gillespie v. Moon, 1817, 2 Johns. Ch. 585 (Am.); M'Cormack v. M'Cormack, 1876, Ir. R. 11 Eq. 130; Welman v. Welman, 1880, 15 Ch. D. 570.

¹ Lovesy v. Smith, 1880, 15 Ch. D. 655.

² May v. Platt, [1900] 1 Ch. 616 (Farwell, J.).

³ Mortimer v. Shortall, 1842, 2 Dru. & War. 372; Murray v. Parker, 1854, 19 Beav. 305; Rooke v. Ld. Kensington, 1856, 25 L. J. Ch. 795; Bentley v. Mackay, 1862, 31 L. J. Ch. 697; Sells v. Sells, 1860, 29 L. J. Ch. 500; Fowler v. Fowler, 1859, 4 De G. & J. 250; Elwes v. Elwes, 1861, 2 Giff. 545; Bradford v. Romney, 1862, 31 L. J. Ch. 497; Gray v. Boswell, 1862, 13 Ir. Ch. R. 77; Fallon v. Robins, 1865, 16 Ir. Ch. R. 422. See Bloomer v. Spittle, 1872, L. R. 13 Eq. 427.

⁴ Mortimer v. Shortall, 1842, 2 Dru. & War. 374 (Ir.) (Sugden, C.); Murray v. Parker, 1854, 19 Beav. 305; Rooke v. Ld. Kensington, 1856,

25 L. J. Ch. 795; Bentley v. Mackay, 1862, 31 L. J. Ch. 697; Sells v. Sells, 1860, 29 L. J. Ch. 500; Fowler v. Fowler, 1859, 4 De G. & J. 250; Elwes v. Elwes, 1861, 2 Giff. 545; Bradford v. Romney, 1862, 31 L. J. Ch. 497; Gray v. Boswell, 1862, 13 Ir. Ch. R. 77; Fallon v. Robins, 1865, 16 Ir. Ch. R. 422. See Harris v. Pepperell, 1867, L. R. 5 Eq. 1.

⁵ 1 Story, Eq. Jur. § 144, n.

⁶ Mortimer v. Shortall, 1842, 2 Dru. & War. 372 (Ir.); Alexander v. Crosbie, 1835, Lloyd & G. 150; M. of Townsend v. Strangroom, 1801, 6 Ves. 339; Gillespie v. Moon, 1817, 2 Johns. Ch. 585 (Am.) (Kent, C.); Lovesy v. Smith, 1880, 15 Ch. D. 655.

⁷ 1 Story, Eq. Jur. § 161; 2 id. § 770; M. of Townsend v. Strangroom, 1801, 6 Ves. 339; Davies v. Fitton, 1842, 2 Dru. & War. 232; Wood v. Scarth, 1855, 2 Kay & J. 33; Webster v. Cecil, 1861, 30 Beav. 62; Manser v. Back, 1848, 6 Hare, 443; Howard v. Wright, 1823, 2 Coop. 114; Squire v. Campbell, 1836,

But here the following artificial distinction is recognised in British courts: parol evidence may be received *against* a plaintiff seeking a specific performance, but it will be inadmissible in his *favour*. In other words, the courts will not receive parol evidence on the part of a plaintiff to rectify a written agreement, of which he seeks a specific execution.¹ In America, Chancellor Kent has rejected this distinction;² and Story, J., takes the same view, observing that there is no mutuality or equality in the operation of such a doctrine.³

§ 1141.⁴ Moreover, the rule against varying or contradicting a written document by parol evidence⁵ does not exclude verbal evidence adduced to prove that the written agreement has been *totally* waived or discharged. An agreement by *deed* can, indeed, only be entirely, or even partially, dissolved by an instrument of an equally solemn character; the maxim of law being that *unumquodque ligamen dissolvitur eodem ligamine quo et ligatur*.⁶ Thus to an action on a covenant for payment of money, a parol discharge, without a deed, in satisfaction of all demands is no available defence;⁷ and an action by a landlord against his tenant on the latter's covenant to yield up, at the expiration of the term, all erections set up during the tenancy, is not answered by proof of a subsequent agreement (not by deed), that if defendant built a greenhouse on the premises, he should be at liberty

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2 Coop. 114. See *Carpenter v. Providence Washington Ins. Co.*, 1846, 4 How. Sup. Ct. R. 222 (Am.).

¹ *Davies v. Fitton*, 1842, 2 Dr. & War. 232 (Ir.) (Sugden, C.); *M. of Townsend v. Strangroom*, 1801, 6 Ves. 328; *Woollam v. Hearne*, 1802, 7 Ves. 211; *Higginson v. Clowes*, 1808, 15 Ves. 516; *Clowes v. Higginson*, 1813, 1 Ves. & B. 375; *Rich v. Jackson*, 1794, 4 Bro. C. C. 514; *Clinan v. Cooke*, 1802, 1 Sch. & Lef. 38 (Ir.); *Att.-Gen. v. Sitwell*, 1835; *Squire v. Campbell*, 1836, 2 Coop. 114 (Ld. Cottenham). See, however, *McCormack v. McCormack*, 1876, Ir. R. 11 Eq. 130; *Gun v. McCarthy*, 1884, 13 L. R. Ir. 304.

² *Keisselbrack v. Livingstone*, 1819, 4 Johns. 114 (Am.).

³ 1 Story, Eq. Jur. § 161, and n. Those who require further information on this subject are referred to

1 Sug. V. & P. (10th edit.) 222—233, 258—266; 1 Story, Eq. Jur. §§ 152—161; *Gresl. Ev.* 205—209.

⁴ *Gr. Ev.* § 302, in part, as to first five lines.

⁵ Set out in § 1132.

⁶ 2 Inst. 360; *Wing. Max.* 68—72; *Story, Agen.* § 49; *Fowell v. Forrest*, 1669-70, 2 Wms. Saund. 47 ff., 47 gg.; *Harris v. Goodwyn*, 1841, 2 M. & Gr. 405; *Doe v. Gladwin*, 1845, 14 L. J. Q. B. 189; *Rawlinson v. Clarke*, 1845, 14 L. J. Ex. 364.

⁷ *Rogers v. Payne*, 1768, 2 Wils. 376, recognised in *West v. Blakeway*, 1841, 10 L. J. C. P. 173; *Cordwent v. Hunt*, 1818, 8 Taunt. 596. See *Spence v. Healey*, 1853, 22 L. J. Ex. 249; *May. of Berwick v. Oswald*, 1853, 22 L. J. Q. B. 129; *The Thames Iron Works Co. v. The Roy. Mail St. Packet Co.*, 1862, 31 L. J. C. P. 169.

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1143. to remove it.¹ Formerly, indeed, an agreement in discharge of a deed was equally inadmissible whether it was in writing or merely verbal, or whether it was executory or executed; so that if an act was required by deed to be done within a certain time, evidence could not be given to show that the period was extended by some instrument not under seal, and that the act was performed within the time so extended.² Perhaps, however, now, in this latter event, the courts would grant relief on equitable grounds;³ at least, if it could be shown that the license to extend the time was founded on some good consideration.⁴

§ 1142. The doctrine just stated has, however, nothing to do with the general rule that a written document cannot be contradicted or varied by parol evidence.⁵ It rests entirely on the solemn nature of deeds. Consequently, in the case of agreements not under seal, to adopt the language of Lord Denman,⁶ in the *absence of statutory interference*: “After an agreement has been reduced into writing, it is competent to the parties, at any time before breach of it, by a new contract not in writing either altogether to waive, dissolve, or annul the former agreement, or in any manner to add to, or subtract from, or vary, or qualify the terms of it, and thus to make a new contract, which is to be proved, partly by the written agreement, and partly by the subsequent verbal terms, engrafted upon what will be thus left of the written agreement.”

§ 1143. Where, indeed, writing is by statute made necessary to the validity of an agreement, the rule is different. The better opinion is, however, that contracts concerning the sale of land or goods, which fall within the 4th section of the Statute of

¹ *West v. Blakeway*, 1841, 10 L. J. C. P. 173. But see *Cort v. Ambergate, &c. Rail. Co.*, 1851, 20 L. J. Q. B. 460.

² *Gwynne v. Davy*, 1840, 1 M. & Gr. 857; *Littler v. Holland*, 1790, 3 T. R. 590. See *Nash v. Armstrong*, 1861, 30 L. J. C. P. 286. See, also, *Williams v. Stern*, 1879, 5 Q. B. D. 409 (C. A.), questioning *Albert v. The Grosvenor Invest. Co.*, 1867, L. R. 3 Q. B. 123.

³ *Gwynne v. Davy*, 1840, 1 M. & Gr. 857 (*Tindal, C.J.*).

⁴ See *Williams v. Stern*, 1879, 5

Q. B. D. 409 (C. A.).

⁵ Set out in § 1132.

⁶ In *Goss v. Nugent*, 1833, 2 B. & Ad. 58. By Scotch law no written obligation whatever can be extinguished or renounced, without either the creditor's oath, or a writing signed by him. *Tait, Ev.* 325 (S.). Neither can a written agreement be afterwards waived or varied by mere words: though a subsequent parol agreement, accompanied or followed by part performance, will suffice for that purpose: *Bargaddie Coal Co. v. Wark*, 1859, 3 Macq. 467 (H. L.).

Frauds, or § 4 of the Sale of Goods Act, 1893,¹ may be *wholly* §§ ~~1143~~
~~waived or abandoned~~ by a *subsequent oral agreement*, so as to 1145.
 prevent either party from recovering on the original written
 contract; for the Act, without distinctly stating that the con-
 tracts in question must be in writing, merely says that, unless
 they are so, no action shall be brought upon them.²

§ 1143A. The result is that no general rule can safely be laid
 down as to the validity of the oral dissolution of a statutory
 instrument; but in each case, the special language of the Act
 requiring the writing must be duly considered; while in several
 cases (as, for instance, in that of a will) it is clear that a verbal
 abandonment will not suffice.³

§ 1144. But, whatever may be the effect of an oral dissolution
 of the *whole* of a statutory contract, *no verbal agreement to abandon*
it in part or to add to, or modify, its terms, can be received. To
 allow such contracts to be proved partly by writing, and partly
 by oral testimony, would let in all the mischiefs which it was
 the object of the Legislature to exclude; consequently, it matters
 not what term of the written contract is sought to be varied by
 parol, and no distinction can be drawn between the material and
 immaterial parts of the contract; but everything which originally
 formed part of the agreement must be deemed to be material.⁴

§ 1145. Accordingly, if a written contract for the sale, either
 of goods above the value of 10*l.*, or of lands, state a time for the
 delivery of the goods, or for the completion of the purchase, no
 verbal agreement to substitute another day for the one originally
 agreed upon will be valid,⁵ but the original contract may still be

¹ 56 & 57 V. c. 71.

² *Goss v. Ld. Nugent*, 1833, 2 B. & Ad. 58 (Ld. Denman); *Price v. Dyer*, 1810, 17 Ves. 356 (Sir W. Grant). These dicta go far towards overruling Lord Hardwicke's contrary opinion in *Buckhouse v. Crossby*, 1737, 2 Eq. Cas. Ab. 32, pl. 44; and in *Bell v. Howard*, 1741, 9 Mod. 305.

³ *Ante*, § 1063.

⁴ *Marshall v. Lynn*, 1840, 9 L. J. Ex. 126 (Parke, B.); *Emmet v. Dewhirst*, 1852, 21 L. J. Ch. 497; *Moore v. Campbell*, 1854, 23 L. J.

Ex. 310; *Sanderson v. Graves*, 1875, L. R. 10 Ex. 234; *Vezey v. Rashleigh*, [1904] 1 Ch. 634.

⁵ *Stowell v. Robinson*, 1837, 6 L. J. C. P. 326; *Marshall v. Lynn*, 1840, 9 L. J. Ex. 126; *Stead v. Dawber*, 1839, 10 A. & E. 57; *Tyers v. Rosedale and Ferryhill Iron Co.*, 1875, L. R. 8 Ex. 305. These cases overrule *Cuff v. Penn*, 1813, 1 M. & Selw. 21; *Warren v. Stagg*, 1787, cited in *Littler v. Holland*, 1790, 3 T. R. 591; and *Thresh v. Rake*, 1794, 1 Esp. 53. See *Ogle v. Ld. Vane*, 1868, L. R. 2 Q. B. 275.

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enforced in its entirety;¹ a vendor who has contracted in writing to sell to a purchaser certain lots of land, and to make out a good title to them, is not at liberty to show a verbal waiver by the purchaser of his right to a good title as to one lot (since to allow this would be to substitute a partly oral contract for the one which the Statute of Frauds required to be in writing);² a contract by a master to pay his clerk a *yearly* salary (which is necessarily in writing, being one not to be performed within a year from its date) cannot be varied by parol evidence to show either a contemporaneous, or a subsequent, verbal agreement that the salary should be paid quarterly, or to prove the fact that quarterly payments had usually been made;³ and where an entire written agreement consists of divers particulars, some of which are within and others without, the Statute of Frauds, evidence cannot be given of a verbal agreement to vary the latter part even in some trifling particular (as, for instance, to have one valuer instead of two), though that part of the contract might, standing alone, have been good without any writing.⁴

§ 1146. In applying the doctrine that a written instrument cannot be contradicted or varied by parol *to testamentary instruments*, a distinction must be noted between the revocation of a will, and the ademption, or rather, the payment by anticipation, of a legacy. For, although a will can be neither wholly nor partly revoked or abandoned by words, parol evidence is admissible to establish either a total or a partial ademption of a legacy originally contained therein. By "ademption" the law means, that the subject-matter of the legacy has been aliened by the testator in his lifetime.⁵ Thus, where a testator bequeathed 3000*l.* to his daughter for her separate use for life, with remainder to her children, and the residue of his property to his son, in a suit to have the legacy invested and secured, it was

¹ *Noble v. Ward*, 1867, L. R. 1 Ex. 117. See, also, *Leather Cloth Co. v. Hieronimus*, 1875, L. R. 10 Q. B. 140; *Hickman v. Haynes*, 1875, L. R. 10 C. P. 598; *Plevins v. Downing*, 1876, 1 C. P. D. 220.

² *Goss v. Ld. Nugent*, 1833, 5 B. & Ad. 58.

³ *Giraud v. Richmond*, 1846, 15 L. J. C. P. 180; *Evans v. Roe*, 1872, L. R. 7 C. P. 138.

⁴ *Harvey v. Grabham*, 1836, 5 A. & E. 61.

⁵ *Harrison v. Jackson*, 1877, 7 Ch. D. 339.

held that it might be shown by extrinsic parol evidence that, after the date of the will, the testator had, at his daughter's request, paid her husband 500*l.*, and then declared that this sum was to be considered in part satisfaction of the legacy, expressing a determination not to alter his will, having been advised by his solicitor that it was unnecessary to do so.¹ The evidence here admitted did not in any way revoke or alter the will, but simply proved a transaction whereby the daughter had in part received her legacy by anticipation; while the testator's declarations, contemporaneously with the advance, were considered as part of that transaction.

§ 1147. The rule excluding parol evidence to vary or contradict a written document,² moreover, is not infringed by proof of any *collateral* parol agreement, which does not interfere with the terms of the written contract, though it may relate to the same subject-matter.³ For instance, where parties to a charter-party afterwards agreed by parol to use the ship for a period which was to elapse before the charter-party attached, it was held that this latter contract might be enforced by action.⁴ The fact of a written demise of an unfinished house having been signed will not preclude the tenant from proving that, subsequently to the agreement for the demise, but at the time when the parties signed it, the landlord verbally agreed with him to put the premises into a habitable state.⁵ Nor will the fact of a lease or agreement having been signed preclude parol evidence of a collateral warranty that the drains are in good condition,⁶ the lease or agreement being silent on the subject of drainage.⁷ Where parties have agreed for the lease of a house to be built upon land at a cost of 400*l.*, a collateral agreement that if their cost exceeded 400*l.* the rent should be proportionate to the expenditure, has been held to be admissible.⁸ Letters which have passed during

¹ *Kirk v Eddowes*, 1844, 13 L. J. Ch. 102; *Ferris v. Goodburn*, 1858, 27 L. J. Ch. 574. See *Nevin v. Drysdale*, 1867, 36 L. J. Ch. 662.

² Set out in § 1132.

³ See ante, § 1135.

⁴ *White v. Parkin*, 1810, 12 East, 578. See *Seago v. Deane*, 1828, 3 C. & P. 170; *Fletcher v. Gillespie*, 1826, 3 Bing. 635; *Foster v. Allan-*

son, 1788, 2 T. R. 479.

⁵ *Mann v. Nunn*, 1874, 43 L. J. C. P. 241; *Angell v. Duke*, 1875, 44 L. J. Q. B. 78.

⁶ *De Lassalle v. Guildford*, [1901] 2 K. B. 215.

⁷ *Lloyd v. Sturgeon Falls Pulp Co.*, 1901, 85 L. T. 162.

⁸ *Williams v. Jones*, 1887, 36 W. R. 573.

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negotiations which have terminated in a written agreement, are admissible to support a collateral verbal agreement set up by one of the parties ;¹ and if money be received, under circumstances raising an implied promise to pay it to another, or under an express promise so to do, and a deed be subsequently entered into between the parties in order to ascertain the amount to be paid, an action of simple contract can apparently be afterwards, nevertheless, sustained.² If, however, a debt be secured by deed, the claim to payment of it still arises on the deed, even though there has been a subsequent statement of an account respecting it, and the striking of a balance under these circumstances creates no new liability.³

§ 1148.⁴ Next, the rule forbidding the variation or contradiction of written documents by parol evidence does not restrict the court to the perusal of a single instrument or paper ; for, while the controversy is between the original parties, or their representatives, all *contemporaneous writings* relating to the same subject-matter, are admissible in evidence, provided only that they be of equal solemnity with the principal document, *and that no oral testimony be required for the purpose of connecting them therewith.*⁵

§ 1149.⁶ The rule excluding parol evidence to vary or contradict written agreements is, moreover, *applied only in suits between the parties* to the instrument, and their representatives. These latter are to blame if the writing contains what was not intended, or omits what it should have contained. But third persons are not prejudiced by things recited in writing, contrary to the truth, through the ignorance, carelessness, or fraud of the parties, or thereby precluded from proving the truth, however contradictory

¹ *Pearson v. Pearson*, 1884, 27 Ch. D. 149 (C. A.).

² *Edwards v. Bates*, 1844, 7 M. & G. 600.

³ *Middleditch v. Ellis*, 848, 17 L. J. Ex. 365.

⁴ Gr. Ev. § 283, in part.

⁵ *Leeds v. Lancashire*, 1809, 2 Camp. 205; *Hartley v. Wilkinson*, 1815, 4 Camp. 127; *Stone v. Metcalf*, 1815, 1 Stark. R. 53; *Bowerbank v. Monteiro*, 1813, 4 Taunt. 846; *Gale v. Williamson*, 1841, 10

L. J. Ex. 446; *Brown v. Langley*, 1842, 12 L. J. C. P. 62; *Peek v. N. Staffords. Rail. Co.*, 1858, 27 L. J. Q. B. 465; *Hunt v. Livermore*, 1827, 5 Pick. 395 (Am.); *Davlin v. Hill*, 1834, 2 Fairf. 434 (Am.); *Couch v. Meeker*, 1817, 2 Conn. 302 (Am.); *Lee v. Dick*, 1836, 10 Pet. 482 (Am.); *Bell v. Bruen*, 1843, 17 Pet. 191 (Am.); ante, § 1026.

⁶ Gr. Ev. § 279, as to first nine lines.

it may be to the written statement.¹ Thus, in settlement cases, where the validity of the settlement depended upon the value of an estate, evidence of a greater sum having been paid for such estate than recited in the purchase deed was admissible;² in similar cases, parol evidence has been received to show that lands, described in a deed of conveyance as in one parish, were in fact situated in another;³ or to show that, at the time of entering into a contract of service in a particular employment, a verbal agreement was made to pay a sum of money as a premium for teaching the pauper the trade, and that, as this amounted to an apprenticeship, the whole transaction was void for want of a stamp, and no settlement was gained under it;⁴ or to show, where an unstamped assignment of a parish apprentice stated a consideration which would have (if true) made a stamp needful, that the real circumstances were such that the instrument did not require a stamp.⁵

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§ 1150. Some of the cases cited in the last paragraph have been said to have been determined, not only on the ground that the contending parties were strangers to the deeds, but on the principle that, though parol evidence is inadmissible to contradict a written agreement, it may be offered to ascertain an independent collateral fact explanatory of the instrument.⁶ However this may be, it certainly is also established that the rule will not be infringed by adducing extrinsic evidence even to contradict a deed or other writing, provided the contradiction be confined to the *recitals* of *formal matter*, for these are not matters of agreement at all, and may well be presumed not to have been stated with careful precision.⁷ Accordingly, parol evidence has, on several occasions, been admitted, to contradict the date which a deed, order, or other instrument purports, or is recited to bear, and to prove that its real date was different.⁸

¹ R. v. Cheadle, 1832, 3 B. & Ad 838.

² R. v. Scammonden, 1789, 3 T. R. 474; R. v. Olney, 1813, 1 M. & Selw. 387; R. v. Cheadle, 1832, 3 B. & Ad. 838.

³ R. v. Wickham, 1835, 3 A. & E. 517.

⁴ R. v. Laindon, 1799, 8 T. R. 379.

⁵ R. v. Llangunnor, 1831, 2 B. & Ad. 616.

⁶ R. v. Stoke-upon-Trent, 1843, 13 L. J. Q. B. 41; Summers v. Moorhouse, 1884, 13 Q. B. D. 388.

⁷ 3 St. Ev. 787, 788; 2 Poth. Obl. 181, 182.

⁸ Hall v. Cazenove, 1804, 4 East, 477. See Steele v. Mart, 1825, 4 B. & C. 273; Cooper v. Robinson, 1842,

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§ 1151. Having now pointed out several classes of cases to which the rule rejecting parol evidence in contradiction of a written document¹ does not extend, we may usefully advert shortly to some of the leading cases in which such rule¹ has been applied.² Its reason and policy, as well as its nature and extent, will both be best thus seen. For example,³ where a policy of insurance was effected on goods "in ship or ships from Surinam to London," parol evidence is inadmissible to show that a particular ship, which has been lost, was verbally excepted at the time of the contract;⁴ where a policy or shipping instrument contains express statements, descriptions, or provisions, parol evidence in direct contradiction to them is not admissible;⁵ where an instrument purports to be an absolute engagement to pay on a specified day, parol evidence of a contemporaneous oral agreement, that payment should be either hastened or postponed,⁶ or that such payment should depend upon a contingency,⁷ or that it should be made out of a particular fund,⁸ or that a bill of exchange should be renewed on maturity,⁹ must be rejected; and where goods are sold under a written contract, silent as to the time both for their removal and of that for payment, parol evidence is inadmissible to prove, either that the goods were to be removed immediately,¹⁰ or were sold on a credit of six months.¹¹

12 L. J. Ex. 48; *R. v. Flintshire*, 1846, 3 Dowl. & L. 537; *Reffell v. Reffell*, 1866, L. R. 1 P. & D. 139.

¹ Set out in § 1132.

² See *Fawkes v. Lamb*, 1682, 31 L. J. Q. B. 98.

³ Gr. Ev. § 281, in part.

⁴ *Weston v. Emes*, 1808, 1 Taunt. 115.

⁵ *Kaines v. Knightly*, 1682, Skin. 54; *Leslie v. De la Torre*, 1795, cited 12 East, 583.

⁶ *Hoare v. Graham*, 1811, 3 Camp. 57; *Spartali v. Benecke*, 1850, 19 L. J. C. P. 293, as explained by *Williams, J.*, in *Field v. Lelean*, 1861, 30 L. J. Ex. 170; *Besant v. Cross*, 1851, 20 L. J. C. P. 173; *Hanson v. Stetson*, 1827, 5 Pick. 506 (Am.); *Spring v. Lovett*, 1831, 11 Pick. 417 (Am.); *Sayward v. Stevens*, 1854, 69 Mass. 97 (Am.); and other American cases cited *Greenleaf on Ev.*, 15th edit., 1892,

note to § 231, at p. 377.

⁷ *Abrey v. Crux*, 1869, L. R. 5 C. P. 37; *M'Dougall v. Field*, 1872, Ir. R. 6 C. L. 185; *Rawson v. Walker*, 1816, 1 Stark. 361; *Adams v. Wordley*, 1836, 5 L. J. Ex. 158; *Foster v. Jolly*, 1835, 19 L. J. Ex. 403; *Free v. Hawkins*, 1817, 8 Taunt. 92; *Woodbridge v. Spooner*, 1819, 3 B. & Ald. 233; *Stott v. Fairlamb*, 1883, 53 L. J. Q. B. 47; *Moseley v. Hanford*, 1830, 10 B. & C. 729; *Erwin v. Saunders*, 1823, 1 Cowen, 249 (Am.); *Hunt v. Adams*, 1811, 7 Mass. 518 (Am.). See *Salmon v. Webb*, 1852, 3 H. L. C. 510.

⁸ *Campbell v. Hodgson*, 1819, Gow, 74.

⁹ *New London Credit Syndte. v. Neale*, [1898] 2 Q. B. 487.

¹⁰ *Greaves v. Ashlin*, 1813, 3 Camp. 426. See, also, *Harnor v. Groves*, 1855, 15 C. B. 667.

¹¹ *Ford v. Yates*, 1844, 2 M. & Gr.

§ 1152. Again, where a written agreement of partnership is unlimited as to the time of commencement, parol evidence, that it was at the same time verbally agreed that the partnership should not commence till a future day, is inadmissible;¹ where there is a written memorandum of lease at a certain rent, parol evidence of a contemporaneous verbal agreement to also pay the ground-rent to the ground-landlord,² or by the landlord where the lease contained covenants as to title, to discharge an incumbrance not created by himself,³ must be rejected; where a ship is particularly described in a written contract of sale, parol evidence of a further descriptive representation, made prior to the sale, is inadmissible except in support of a charge of fraud;⁴ evidence of a promise by a lessee to work a certain quantity of the subject of a mining lease is inadmissible;⁵ evidence that the grantee's name in a deed is a mistake is also inadmissible;⁶ and where a deed conveyed the messuage and land called Gotton farm, consisting of particulars specified in a schedule, and delineated in a map drawn thereon, evidence that a close, not included in the map and schedule, had always been occupied and treated as part of Gotton farm, was rejected.⁷

§§ 1152,
1153.

§ 1153. Further, on a sale (prior to the Apportionment Act, 1870⁸) of land let for years, a contemporaneous parol agreement, that the current quarter's rent should be apportioned between vendor and purchaser, was inadmissible.⁹ It was, moreover, at one time, supposed that when a promissory note was in its terms

549. There it was erroneously assumed, that a memorandum, which really contained the name of only one of the parties, was sufficient to satisfy the Statute of Frauds. See *Lockett v. Nicklin*, 1848, 19 L. J. Ex. 403, cited ante, § 1134.

¹ *Dix v. Otis*, 1827, 5 Pick. 38 (Am.).

² *Preston v. Merceau*, 1775, 2 W. Bl. 1249. See *The Isabella*, 1799, 2 C. Rob. Adm. 241; *White v. Wilson*, 1800, 2 B. & P. 116; *Rich v. Jackson*, 1794, 4 Bro. C. C. 514; *Brigham v. Rogers*, 1822, 17 Mass. 571 (Am.).

³ *Howe v. Walker*, 1855 (Am.).

⁴ *Pickering v. Dowson*, 1813, 4 Taunt. 779. See, also, *Stucley v.*

Baily, 1862, 31 L. J. Ex. 483; *Powell v. Edmunds*, 1810, 12 East, 6; *Pender v. Fobes*, 1838, 1 Dev. & B. 250 (Am.); *Wright v. Crookes*, 1840, 1 Scott, N. R. 685.

⁵ *Lyn v. Miller*, 1855, 24 Pa. St. 392 (Am.); and other American cases cited in *Greenleaf on Ev.*, 15th edit. (1892), note to § 281, at p. 379.

⁶ *Crawford v. Spencer*, 1851, 62 Mass. 418 (Am.).

⁷ *Barton v. Dawes*, 1850, 19 L. J. C. P. 302; *Llewellyn v. Id. Jersey*, 1843, 12 L. J. Ex. 243. See post, §§ 1224, 1225.

⁸ 33 & 34 V. c. 35.

⁹ *Flinn v. Calow*, 1840, 1 M. & Gr. 589.

§ 1153.

joint, evidence could in no case be given that one of the makers was merely a surety, and that the payee had given time to the principal;¹ but this doctrine has been held inapplicable to a case where a money-lender has made advances on the security of a joint and several note, being well aware at the time that one of its makers was a surety.² In such a case the surety, notwithstanding the form of the note, may now set up as a defence that when the note was made he was known by the lender to be a surety, and that, without his consent, the principal has had time given to him by the lender.³ It appears, however, still to be law that in general if a party sign a bill of exchange, a charter-party,⁴ or indeed, any written contract, in his own name, and there is nothing in the instrument to show that he intends *only* to sign on behalf of a named principal,⁵ he cannot avoid his personal liability by parol evidence that he merely signed as agent, and that the other party knew this.⁶ If, however, it is sought on the one hand to charge with liability,⁷ or on the other to give the benefit of the contract to,⁸ an unnamed principal, such evidence will be received; and this, too, whether the Statute of Frauds does or does not require the agreement to be in writing; for, in the cases first cited the parol evidence would

¹ *Abbott v. Hendricks*, 1840, 1 M. & Gr. 791; *Manley v. Boycot*, 1853, 22 L. J. Q. B. 265; *Strong v. Foster*, 1855, 25 L. J. C. P. 106. See *Davis v. Stainbank*, 1855, 6 De G. M. & G. 679; *Riley v. Gerrish*, 1851, 9 Cush. 104 (Am.); and *Myrick v. Dame*, 1852, 9 Cush. 248.

² *Greenough v. McClelland*, 1861, 30 L. J. Q. B. 15; *Mutual Loan Fund Assoc. v. Sudlow*, 1858, 28 L. J. C. P. 108; *Pooley v. Harradine*, 1857, 26 L. J. Q. B. 156; *Taylor v. Burgess*, 1859, 22 L. J. Ex. 7; *Lawrence v. Walmsley*, 1862, 31 L. J. C. P. 143; *Bristow v. Brown*, 1862, 13 Ir. C. L. R. 201; *Bailey v. Edwards*, 1865, 34 L. J. Q. B. 41; *Overend, Gurney & Co. v. Oriental, &c. Corp.*, 1874, L. R. 7 H. L. 348.

³ *Id.*

⁴ *Hough v. Manzanos*, 1879, 48 L. J. Ex. 398.

⁵ *Gadd v. Houghton*, 1877, 46 L. J. Ex. 71 (C. A.).

⁶ *Higgins v. Senior*, 1841, 11 L. J.

Ex. 199; *Roy. Ex. Ass. Co. v. Moore*, 1863, 8 L. T. 242; *Sowerby v. Butcher*, 1834, 2 C. & M. 371; *Magee v. Atkinson*, 1837, 6 L. J. Ex. 115; *Jones v. Littledale*, 1837, 6 A. & E. 486; *Stackpole v. Arnold*, 1814, 11 Mass. 27 (Am.); *Hunt v. Adams*, 1811, 7 Mass. 518 (Am.); *Shankland v. City of Washington*, 1831, 5 Pet. 394 (Am.); *Lefevre v. Lloyd*, 1814, 5 Taunt. 749. But see *Holding v. Elliott*, 1860, 29 L. J. Ex. 134, cited ante, § 804. See, also, *Williamson v. Barton*, 1862, 31 L. J. Ex. 170.

⁷ *Paterson v. Gandasequi*, 1812, 15 East, 62; cited and confirmed in *Higgins v. Senior*, 1841, 11 L. J. Ex. 199; *Calder v. Dobell*, 1871, L. R. 6 C. P. 486; *Young v. Schuler*, 1883, 11 Q. B. D. 671 (C. A.).

⁸ *Garrett v. Handley*, 1825, 4 B. & C. 664; *Bateman v. Phillips*, 1812, 15 East, 272; both cited and confirmed in *Higgins v. Senior*, 1841, as reported 8 M. & W. 844 (Parke, B.).

clearly contradict the written agreement, in these we are now considering it would have no such effect, since without denying the agreement to be binding on the party whom it purported to bind, it would show that another party, namely the principal, was also bound, on the well-known doctrine that the act of an authorised agent is, in law, the act of the principal.¹ A contract however, made by a person intending to contract on behalf of a third party but without his authority, cannot be ratified by the third party so as to render him able to sue or liable to be sued on the contract, where the person who made the contract did not profess at the time of making it to be acting on behalf of a principal.²

§ 1154. Still less is the rule excluding parol evidence to contradict or vary a written document violated by it being held (as it is) that a person who describes himself in a written contract as agent of an unnamed principal, may be shown by the party with whom he contracted to be the real principal.³ He may even in an action by himself against the other contracting party, repudiate the character of agent and adopt that of principal; and on furnishing proof that he entered into the agreement on his own behalf, will be entitled to recover.⁴ Where, however, an agent, employed to enter into a charter-party, described himself in the instrument as the owner of the ship, in an action by the principal on the charter-party, it was held that parol evidence that the agent acted merely as agent could not be given, since it would directly contradict the written document.⁵

§ 1155. So strict is the rule that parol evidence cannot be received to vary or contradict a written document that even the subsequent admission of a party as to the true intent and construction of the title-deed under which he claims, cannot be received in contradiction of the language therein contained.⁶ Thus, the plain language of a deed purporting to convey a

¹ *Higgins v. Senior*, 1841, 11 L. J. L. J. Q. B. 228.

Ex. 199 (Parke, B.).

² *Keighley, Moxted & Co. v.* L. J. Q. B. 350.

Durant, [1901] A. C. 240 (H. L.).

³ *Carr v. Jackson*, 1852, 21 L. J. Ex. 137.

⁴ *Schmeltz v. Avery*, 1851, 20

⁵ *Humble v. Hunter*, 1848, 17

L. J. Q. B. 350.

⁶ *Pain v. M'Intier*, 1804, 1 Mass.

69 (Am.). See, also, *Townsend v.*

Weld, 1811, 8 Mass. 146 (Am.).

§§ 1155—1157. message in the occupation of A., *with the appurtenances*, cannot be contradicted either by the written conditions of sale excepting the garden, or by the declarations of the grantee that he had not purchased it.¹

§ 1156. Still less will any statements made by the writer of an instrument be receivable in evidence with the view of varying its terms. Thus, where a testator devised to his eldest son his residence with the *buildings to the same adjoining*, and left to his second son all his other real property, evidence of declarations made by him, while giving instructions for his will, showing that he intended some other cottages which adjoined his residence when such will was made to pass to such second son, was rejected.² Where, too, in a will, a complete *blank* is left for the description of the legatee or devisee,³ or for the amount of the legacy, or for the description of the estate or thing devised,⁴ no parol evidence, however strong, will be allowed to fill it up as intended by the testator.

§ 1157. Neither⁵ under a devise by a testator of all his freehold and real estate “in the county of Limerick, and in the city of Limerick,” he having no real estates in the *county* of Limerick, but only possessing landed property consisting of estates in the county of Clare, which were not mentioned in the will, and a small estate in the *city* of Limerick, which was inadequate to meet the testamentary charges, was the devisee allowed to show by parol evidence, that the estates in the county of Clare were inserted in the devise to him in the first draft of the will, which was sent to a conveyancer to make certain alterations not affecting those estates; that such conveyancer by mistake⁶ erased the words “county of Clare;” and that the testator, after keeping the will by him for some time, executed it without adverting to the alteration as to that county. Tindal, L.C.J., in pronouncing the joint opinion of himself, Lds. Lyndhurst, and Brougham,

¹ Doe v. Webster, 1840, 12 A. & E. 442.

² Doe v. Holtom, 1832, 4 A. & E. 76.

³ Hunt v. Hort, 1791, 3 Bro. C. C. 311; Miller v. Travers, 1832, 8 Bing. 250.

⁴ Miller v. Travers, 1832, 8 Bing.

250; Taylor v. Richardson, 1853, 2 Drew. 16.

⁵ Miller v. Travers, 1832, 8 Bing. 250. See, also, In re The Clergy Society, 1856, 2 K. & J. 615.

⁶ See, also, Francis v. Dichfield, 1742, 2 Coop. 531.

L.C.,¹ said : " The plaintiff contends that he has a right to prove that the testator intended to pass, not only the estate in the city of Limerick, but an estate in a county not named in the will, namely, the county of Clare, and that the will is to be read and construed as if the word Clare stood in place of, or in addition to, that of Limerick. But this, it is manifest, is not merely calling in the aid of extrinsic evidence to apply the intention of the testator, as it is to be collected from the will itself, to the existing state of his property ; it is calling in extrinsic evidence to introduce into the will an intention not apparent upon the face of the will. It is not simply removing a difficulty, arising from a defective or mistaken description ; it is making the will speak upon a subject on which it is altogether silent, and is the same in effect as the filling up a blank which the testator might have left in his will. It amounts, in short, by the admission of parol evidence, to the making of a new devise for the testator, which he is supposed to have omitted."²

§§ 1157—
1159.

§ 1158. Extrinsic parol evidence, contradicting, varying, adding to, or subtracting from, the contents of a valid written instrument, is thus inadmissible. This, however, is chiefly because the parties must be presumed to have committed to writing all which they deemed necessary to give full expression to their meaning ; and secondly, because of the mischiefs which would result, if verbal testimony were in such cases received. It is, however, also a principle that, *parol evidence may in all cases of doubt be adduced, to explain the written instrument* ; or, in other words, to enable the court to discover the meaning of the terms employed, and to apply them to the facts.³ Such a "doubt" as is here meant may arise from one or both of the two following causes ; either the *language* of the instrument may be *unintelligible* to the court, or, at least, be *susceptible of two or more meanings* ; or the *persons or things* mentioned *may require to be identified*.⁴ The rule, consequently, lets in evidence of two descriptions.

§ 1159.⁵ First, if the characters, in which the instrument is

¹ *Ld. Lyndhurst, C.B., and Tindal, C.J., assisted the Ld. C. in this case.*

² *Miller v. Travers, 1832, 8 Bing. 250.*

³ *Shore v. Wilson, 1842, 9 Cl. & Fin.*

355 (H. L., Parke, B.).

⁴ *Shore v. Wilson, 1842, 9 Cl. & Fin.*

355 (H. L., Parke, B., and Tindal, C.J.).

⁵ *Gr. Ev. § 280, in part.*

§§ 1159—
1161. written, are in short-hand,¹—or are otherwise difficult to be deciphered,—or if the language, whether as being foreign, obsolete, technical, local, or provincial, is either not understood by the court, or is capable of bearing two or more interpretations,—the testimony of persons skilled in deciphering writings, or who understand the language in which the instrument is written, or the ancient, technical, local, or provincial meaning of the terms employed, is admissible, to interpret the characters, or to translate the instrument, or to testify to the proper meaning of particular expressions.² In several cases, wills, written in a scarcely legible hand, have been interpreted by courts of equity, with the assistance of persons skilled in writing.³ The practice of proving translations of foreign documents is so notorious as to require no authority to support it.

§ 1160. The remainder of the rule is established beyond dispute by an absolute crowd of decisions. The testimony resorted to under the second branch of this rule consists of evidence of *usage*,⁴—that is, witnesses conversant with the business, trade, or locality to which the document relates, are called to testify that, according to the recognised practice and usage of such business, trade, or locality, certain expressions contained in the writing have in similar documents a particular conventional meaning,—and the jury are asked to presume that the parties, who employed these expressions, used them, in the conventional sense, as explained by the witnesses.⁵

§ 1161. Evidence of *usage* to explain the meaning of particular words in a written instrument may either go to show that the words employed are purely local or technical;—that is, words which are not of universal use, but familiarly known and employed, either in a particular district, or in a particular science or trade, or by a particular class of persons;—or to show that such words

¹ See *Kell v. Charmer*, 1856, 23 Beav. 195, cited post, § 1196.

² *Shore v. Wilson*, 1842, 9 Cl. & Fin. 355 (H. L., Parke, B., and Tindal, C. J.); *Wigr. Wills*, 61.

³ *Goblet v. Beechey*, 1829, 3 Sim. 24; *Masters v. Masters*, 1718, 1 P. Wms. 425; *Norman v. Morrell*, 1799, 4 Ves. 769.

⁴ As will presently be seen (post,

§§ 1204, 1205), the word “usage” is frequently used by lawyers to denote a species of evidence, often admitted for the purpose of explaining ancient ambiguous grants, and consisting in the proof of the contemporaneous acts of the grantors or grantees, in relation to the property conveyed.

⁵ See ante, § 181.

have two meanings, the one common and universal, the other technical, peculiar or local. In either case, it will be admissible to define and explain the meaning of the language employed. Thus, where the founder of a charity in the early part of the eighteenth century had, in the deed of grant, described the objects of her munificence as "Godly preachers of Christ's Holy Gospel," on its becoming long afterwards necessary to determine what persons were entitled to this charity, extrinsic evidence was admitted to show, that at the time when the charity was founded a religious sect existed, who applied this particular phraseology (which might seem at first sight of a far wider interpretation), to Protestant Trinitarian Dissenters, of which sect the founder was a member.¹ Where, however, words have by usage two meanings, in addition to giving evidence of this it will also be necessary to prove such additional circumstances, as will raise a presumption that the parties intended to use the words in what logicians call their second intention, unless this can be inferred from reading the instrument itself.

§§ 1161,
1162.

§ 1162. In accordance with the principle just stated, various words in written documents which *primâ facie* present no ambiguity, have been interrupted by extrinsic evidence of usage; and their peculiar meaning, when found in connexion with the subject-matter of the transaction, has been fixed, by parol testimony of the sense in which they were *usually* received, when employed in cases similar to that under investigation.²

¹ *Shore v. Wilson*, 1842, 9 Cl. & Fin. 355, 580 (H. L., Ld. Cottenham). See, also, *Drummond v. Att.-Gen.*, 1849, 2 H. L. C. 837; and 7 & 8 V. c. 45, noticed ante, § 75.

² Some of the principal expressions which have been interpreted in this way, stated in alphabetical order, are the following:—"All Faults" (*Whitney v. Boordman*, 1875, 118 Mass. 242 (Am.)); "Arrived in dock" in a charter-party (*The Steamship Co. Norden v. Dempsey*, 1876, 45 L. J. C. P. 764); "Barrel" (*Miller v. Stevens*, 1868, 100 Mass. 518 (Am.)); "Best oil" in a contract (*Lucas v. Bristow*, 1858, 27 L. J. Q. B. 364); "Corn" (*Mason v. Skurray*, 1780, Park. Ins. 245; *Moody v. Surridge*,

1798, Park. Ins. 245; *Scott v. Bourdillion*, 1806, 2 Bos. & P. N. R. 213); "Cotton in bales" (*Taylor v. Briggs*, 1827, 2 C. & P. 525; *Gorriasson v. Perrin*, 1857, 27 L. J. C. P. 29); "Current funds" (*Thorington v. Smith*, 1868, 8 Wall. (N.S.) 1 (Am.)); "Crop of flax" (*Goodrich v. Stevens*, 1871, 5 Lans. N. Y. 230 (Am.)); "Days," in a bill of lading, as meaning working days (*Cochran v. Retberg*, 1803, 3 Esp. 121); "Duly honoured," as applied to a bill of exchange (*Lucas v. Groning*, 1816, 7 Taunt. 164); "Expected to arrive about November next" is a phrase which in a bought note is a mere description, and creates no contract as to time (*Bold v. Rayner*, 1836, 5

§ 1163.

§ 1163. By an extension of this same principle of construction, the expression "in the month of October" has been allowed to be shown by parol evidence to be the usage of merchants to fix the exact part of that month for the sailing of a vessel;¹ the words warranted "to depart with convoy," by the same usage to show at what place a ship usually took up convoy for a voyage such as the one contemplated;² the responsibility of an underwriter for "general average" under an ordinary policy of insurance on a ship and cargo, may be so limited by a custom of trade as not to extend to jettison of goods which have been stowed on deck;³ "weekly accounts" in a building contract, by the usage of trade, is a technical signification, meaning accounts of day-work only, exclusive of work which is capable of being measured;⁴ where agents have purported to sign "by telegraphic authority as agents," evidence has been admitted to show that by mercantile usage under such words the agents are not

L. J. Ex. 172); "F.o.b." (*Silberman v. Clark*, 1884, 96 N. Y. 524 (Am.)); "Freight" (*Feisch v. Dixon*, 1815, 1 Mason, 11 (Am.)); *Gibbon v. Young*, 1818, 2 Moore, C. P. 224; *Lewis v. Marshall*, 1844, 13 L. J. C. P. 193); "Fur" (*Astor v. Union Insce. Co.*, 1827, 7 Cowen, 202 (Am.)); "Inhabitant" (*R. v. Mashiter*, 1837, 6 A. & E. 153; *R. v. Davie*, 1837, 6 A. & E. 386); "In turn to deliver" in a charter-party (*Robertson v. Jackson*, 1845, 15 L. J. C. P. 28; *Leidemann v. Schultz*, 1853, 23 L. J. Ch. 17); "Level," as understood by miners (*Clayton v. Gregson*, 1836, 5 A. & E. 302); "Months," in a charter-party, as meaning calendar months (*Jolly v. Young*, 1800, 1 Esp. 186, recognised *Simpson v. Margitson*, 1847, 17 L. J. Q. B. 81); "Payable in trade" (*Dudley v. Vose*, 1873, 114 Mass. 34 (Am.)); "Pig iron" (*Mackenzie v. Dunlop*, 1856, 3 Macq. 26 (H. L., *Lord Cranworth*, C.)); "Regular turns of loading" (*Leidemann v. Schultz*, 1853, 23 L. J. Ch. 17); "Salt" (*Journu v. Bourdieu*, 1787); "Spitting of blood," as a term in a policy of insurance (*Singleton v. St. Louis, &c.*, 1877, 66 Mo. 63 (Am.)); "Street," as used in the Public Health Act (*Elliot v. South*

Devon R. C., 1848, 17 L. J. Ex. 262); "Ten pockets of Kent hops at five pounds," as meaning in the hop trade at five pounds per cwt. (*Spicer v. Cooper*, 1841, 1 Q. B. 424); "Thousand," as locally applied to rabbits on a warren (*Smith v. Wilson*, 1832, 3 B. & Ad. 729; recognised (*Williams, J.*) in *Shore v. Wilson*, 1842, 9 Cl. & Fin. 355); "Weeks," as meaning in a theatrical contract only weeks during the theatrical season (*Grant v. Maddox*, 1846, 16 L. J. Ex. 227; and see, also, *Myers v. Sarl*, 1860, 30 L. J. Q. B. 9). In *Symonds v. Lloyd*, 1859, 6 C. B. (n.s.) 691, the rule seems to have been strained to its utmost extent.

¹ *Chaurand v. Angerstein*, 1791, Peake, R. 43. See, also, *Robertson v. Jackson*, 1845, 15 L. J. C. P. 28; and *U. S. v. Breed*, 1832, 1 Sumn. 159 (Am.).

² *Lethulier's case*, 1692, 2 Salk. 443, recognised by *Williams, J.*, in *Shore v. Wilson*, 1842, 9 Cl. & Fin. 355.

³ *Miller v. Tetherington*, 1861, 30 L. J. Ex. 217. See *Kidston v. The Empire Marine Ins. Co.*, 1866, 35 L. J. C. P. 250.

⁴ *Myers v. Sarl*, 1860, 30 L. J. Q. B. 9.

responsible for a term in the contract arising from a mistake in the transmission of the message ;¹ a London packer who acknowledges the receipt of goods "on account of the vendor for the vendee," may prove that by usage, when packers signed receipts in this form, it is their duty not to part with the goods without the vendor's further orders ;² and evidence of usage may similarly be admitted to show that where a merchant has sent written instructions to his *del credere* agent in London, to sell "*on his account*," such agent is by the custom of the London corn trade, warranted in selling in his own name ;³ and by custom brokers who do not disclose their principal,⁴ or who sign as "agents to merchants," but do not state within a certain time for whom they are agents,⁵ may be liable as principals.

§ 1164. The reports contain, again, many cases, where the language of *policies* has been explained by evidence of the understood practice of making voyages in particular branches of trade.⁶ In such cases it is unnecessary for the assured or his broker to communicate the usage to the underwriter, for, as Lord Mansfield observed, "every underwriter is presumed to be acquainted with the practice of the trade he insures ; and if he does not know it, he ought to inform himself."⁷ Accordingly, though, under the words "at and from," a policy would appear at first sight to attach upon the ship's first mooring in a harbour on the coast, yet these expressions, in a Newfoundland policy, were allowed to be explained by evidence that by usage they in that trade mean that the risk is not to commence till the expiration of the fishing (technically called "banking"), or of an intermediate voyage.⁸

§ 1165. But evidence of *usage*, though admissible to explain what is doubtful, is *not admissible to contradict or vary* what is

§§ 1163—
1165.

¹ *Lilly & Co. v. Smales*, [1892] 1 Q. B. 456.

² *Bowman v. Horsey*, 1837, 2 M. & Rob. 85.

³ *Johnston v. Osborne*, 1841, 11 A. & E. 549.

⁴ *Fleet v. Murton*, 1871, L. R. 7 Q. B. 126.

⁵ *Hutchinson v. Tatham*, 1873, L. R. 8 C. P. 482.

⁶ See *Trueman v. Loder*, 1840, 11

A. & E. 600 ; and *Milward v. Hibbert*, 1842, 11 L. J. Q. B. 137.

⁷ *Noble v. Kennaway*, 1780, 2 Doug. 513 ; cases cited in following note ; *Da Costa v. Edmunds*, 1815, 4 Camp. 143.

⁸ *Vallance v. Dewar*, 1808, 1 Camp. 503, 508 ; *Ougier v. Jennings*, 1800, 1 Camp. 505, 506, *n.* ; *Kingston v. Knibbs*, 1809, 1 Camp. 508 (Ld. Ellenborough).

§§ 1165,
1166.

plain.¹ If the words employed in a written instrument have a known legal meaning, parol evidence that the parties intended to use them in some different, though popular, sense, will be rejected; unless such words, if interpreted according to their strict legal acceptation, be wholly insensible with reference either to the context or to the extrinsic facts.² Thus, where a word denoting weight, measure, or number, has had a definite meaning attached to it by the Legislature, any party using that word in a written contract, or a will, will be conclusively presumed to have used it in such sense, unless the contrary clearly appears from some part of the writing itself.³ Thus parol evidence of custom of the country is not admissible to show that the words "Lady Day" or "Michaelmas" in a *lease* (made since the Act of Parliament for altering the style) do not respectively mean the 25th of March and the 29th of September, but relate to the old style.⁴ Words referring to a particular relation (such as "child"⁵ or "grandson"⁶), will, where there is such a one, import the *legitimate* relation of that name, and parol evidence may not show that an *illegitimate* one was meant. But such evidence is receivable if there be no such legitimate relation,⁷ or if the context show that the word is used to include a relation who does not really fill that exact relationship.⁷

§ 1166.⁸ In accordance with the above principle, parol evidence has been rejected when offered to show that on a warranty of "prime singed bacon," it is the practice in the trade to receive

¹ *Blackett v. Roy. Ex. Ass. Co.*, 1832, 2 C. & J. 244; *Crofts v. Marshall*, 1836, 7 C. & P. 597 (Lord Denman). See, also, *Phillips v. Briard*, 1836, 25 L. J. Ex. 233; *Abbott v. Bate*, 1876, 45 L. J. C. P. 117.

² *Wigr. Wills*, 11, 12, cited ante, § 1131, n.

³ *Smith v. Wilson*, 1832, 3 B. & Ad. 729; *O'Donnell v. O'Donnell*, 1882, 13 L. R. Ir. 226; *Hockin v. Cooke*, 1791, 4 T. R. 314; *Att.-Gen. v. Cart Plate Glass Co.*, 1792, 1 Anstr. 39; *Noble v. Durell*, 1789, 3 T. R. 271; *Sleght v. Rhinelanders*, 1806, 1 Johns. 192 (Am.); *Frith v. Barker*, 1807, 2 Johns. 335 (Am.); *Stoever v. Whitman*, 1814, 6 Binn. 417 (Am.);

Henry v. Risk, 1788, 1 Dall. 463 (Am.).

⁴ *Doe v. Lea*, 1809, 11 East, 312. In some cases of *parol* demises, such evidence has indeed been received: *Doe v. Benson*, 1821, 4 B. & Ald. 588; *Furley v. Wood*, 1794, 1 Esp. 198 (Ld. Kenyon); but whether the distinction between a letting by deed, and a letting by parol, would now be sustained, may be seriously doubted.

⁵ *Ellis v. Houstoun*, 1878, 10 Ch. D. 236.

⁶ *Doe v. Taylor*, 1849, 1 Allen. 144 (Am.).

⁷ *Bowers v. Bowers*, 1850, 1 Abb. (N. Y.) App. Dec. 214 (Am.); *Re Cahn*, 1877, 3 Redf. (N. Y.) 81 (Am.).

⁸ *Gr. Ev.* § 292, in part.

bacon slightly tainted as "prime" singed;¹ that upon a policy on a ship, her tackle, apparel, boats, &c., underwriters, by usage, never pay for loss of boats slung upon the quarter, outside of the ship;² that in a memorandum of excepted articles in a fire policy, "glass ware in casks," according to the understanding of insurers and insured, only means such ware in open casks;³ that in a bill of lading, containing the usual clause, "the dangers of the sea only excepted," shipowners, by the custom of the trade, are only liable for damages occasioned by their own neglect, provided they saw the merchandise properly secured and stowed;⁴ that by the custom of a particular port where merchandise is to be delivered and "fourteen days to be allowed for its delivery from the time of the ship's being ready to discharge," this is a stipulation for the benefit of the buyer, but not of the seller;⁵ or that on a charter-party containing terms clearly defining who is to bear the expense of delivery, there is a custom regulating the subject.⁶

§ 1167. On the same principle, evidence that by the custom of the trade, "bills" meant "approved bills," and that the vendor could reject any bill of which he did not approve, was rejected where there had been a sale of goods through a London broker under a written contract stipulating that payment should be made "by bills."⁷

§ 1168. On the other hand, parol evidence of usage or custom

¹ *Yates v. Pym*, 1816, 6 Taunt. 446. See, also, *Maccolmsen v. Morton*, 1847, 11 Ir. L. R. 230.

² *Blackett v. Roy. Ex. Ass. Co.*, 1832, 2 C. & J. 244. See *Hall v. Janson*, 1855, 24 L. J. Q. B. 97. But see, also, *Miller v. Tetherington*, 1862, 31 L. J. Ex. 363; and *Myers v. Sarl*, 1861, 30 L. J. Q. B. 9, both cited ante, § 1162.

³ *Bend v. Georgia Ins. Co.*, 1842, cited in *Gr. Ev.*, § 292 (Am.).

⁴ *The Schooner Reeside*, 1837, 2 Sumn. 567 (Am.).

⁵ *Sotilichos v. Kemp*, 1848, 18 L. J. Ex. 36.

⁶ *The Nifa*, [1892] P. 411. And see also *Scrutton v. Childs*, 1877, 36 L. T. 212; *Hayton v. Irwin*, 1879, 5 C. P. D. 130 (C. A.); *Lishman v.*

Christie, 1887, 19 Q. B. D. 333 (C. A.).

⁷ *Hodgson v. Davies*, 1810, 2 Camp. 531. The learned judge, however, in a subsequent stage of the case, admitted evidence of a usage of trade, which reserved to vendors, selling through brokers in the manner above stated, the power of annulling the contract within a reasonable time after the name of the purchaser had been communicated to them, but serious doubts have been entertained whether he was right in so doing; and whether the custom, thus allowed to be proved, was so incidental to the contract, as in the absence of express words, to be incorporated in it. See *Trueman v. Loder*, 1840, 11 A. & E. 600.

§§ 1168, 1169. is¹ certainly sometimes admissible "*to annex incidents to contracts*,"—that is, to show what things are customarily treated as incidental and accessorial to the principal thing, which is the subject of the contract, or to which the instrument relates. For instance, when a bill of exchange or promissory note, payable either at a fixed time or on demand (not being one payable in England upon demand²) is silent as to any days of grace, in Great Britain three days, called "days of grace," are (subject to provisions as to holidays) added to the time of payment as fixed by the bill,³ and where a bill is payable elsewhere than in England parol evidence of the known and established usage of the country or place is admissible to show on what day the grace expired.⁴ Parol evidence is, moreover, admissible to prove that by local custom in particular trades, general contracts of hiring and service are defeasible on giving a month's notice on either side;⁵ or that persons employed have certain holidays in the year, and the Sundays to themselves;⁶ or that on the death of a tenant for life a heriot is due, and this, though no mention of it is made in the lease,⁷ or that a lessee by deed is entitled to an away-going crop—though no such right be reserved in the deed;⁸ or that a publican, holding premises under a written agreement, reserving a weekly rent, but otherwise silent as to the period of the tenancy, is considered to have a yearly tenure, though the rent be payable weekly,⁹ when he pays in advance the yearly victualler's licence.

§ 1169. Parol evidence is also admissible to show that by usages of particular trades all sales of certain goods are by sample, although this term be not expressed in the bought and sold notes;¹⁰ or (where it is not inconsistent with the contract

¹ Gr. Ev. § 294, as to four lines.

² Which is not entitled to any days of grace. See 45 & 46 V. c. 61, §§ 10—14.

³ See "The Bills of Exchange Act, 1882" (45 & 46 V. c. 61), § 14.

⁴ In *Renner v. Bank of Columbia*, 1824, 9 Wheat. 581 (Am.), the decisions on this point are reviewed by Thompson, J.

⁵ *Parker v. Ibbetson*, 1858, 27 L. J. C. P. 236.

⁶ *R. v. Stoke-upon-Trent*, 1843, 13

L. J. Q. B. 41.

⁷ *White v. Sayer*, 1622, Palm. 211.

⁸ *Wigglesworth v. Dallison*, 1778-79, 1 Doug. 201; *Senior v. Armytage*, 1816, Holt, N. P. R. 197; explained (Parke, B.) in *Hutton v. Warren*, 1836, as reported 1 M. & W. 476; *Hutton v. Warren*, 1836, 5 L. J. Ex. 234. See *In re Estate of M. of Waterford*, 1871, Ir. R. 5 Eq. 434.

⁹ *Lundy v. Reilly*, 1858, 30 L. T. 223 (Ir.).

¹⁰ *Syers v. Jonas*, 1848, 2 Ex. 111;

itself¹) that in the City every buying broker, who does not, at the date of the bargain, name his principal, renders himself liable to be treated by the vendor as the purchaser;² or that a person who contracts expressly as agent is personally liable, if he does not disclose the name of his principal within a reasonable time;³ or that, even where there has been a written contract for the sale of mining shares upon the terms that they shall be *paid for* "half in two, and half in four months," which was silent as to the time of *delivery*, the vendor is, by the usage of brokers, not bound to deliver them without contemporaneous payment.⁴ Similarly, where a horse is sold at a repository (even by private contract) with a written warranty of soundness, in an action for breach of warranty against him, the vendor may show that, by a printed regulation hung up in the repository, warranties only remain in force till twelve o'clock on the day after the sale, that the plaintiff was aware of this regulation, and yet that he made no complaint within the specified time.⁵ Moreover, a custom that all steamships having a general cargo, coming into a certain port, shall discharge their goods on the quay, may be annexed even to a bill of lading of goods which says that the goods are to be discharged in good order from the ship's tackles;⁶ nor is a custom that all goods may, unless demanded within twenty-four hours of a ship's arrival, be landed on the quay, inconsistent with one which provides that goods are to be delivered by a person appointed by the ship's agents, the delivery to be according to the custom of the port.⁷

§§ 1169,
1170.

§ 1170. The rule of annexing incidents by parol, which has time out of mind been adopted in explanation of mercantile

O'Neill v. Bell, 1866, Ir. R. 2 C. L. 68. See, also, Brown v. Byrne, 1854, 23 L. J. Q. B. 313; Cuthbert v. Cumming, 1855, 24 L. J. Ex. 310; Lucas v. Bristow, 1858, 27 L. J. Q. B. 364.

¹ Barrow v. Dyster, 1884, 13 Q. B. D. 635.

² Dale v. Humfrey, 1858, 27 L. J. Q. B. 390; Imperial Bk. v. Lond. & St. Katherine's Dock Co., 1877, 5 Ch. D. 195; Fleet v. Murton, 1872, L. R. 7 Q. B. 126. See Southwell v. Bowditch, 1876, 1 C. P. D. 100 (C. A.).

³ Pike v. Ongley, 1887, 18 Q. B. D.

708 (C. A.); Hutchinson v. Tatham, 1873, L. R. 8 C. P. 482.

⁴ Field v. Lelean, 1861, 30 L. J. Ex. 168; overruling Spartali v. Benecke, 1850, 19 L. J. C. P. 293. See Godts v. Rose, 1855, 25 L. J. C. P. 61.

⁵ Bywater v. Richardson, 1834, 1 A. & E. 508. See Smart v. Hyde, 1841, 10 L. J. Ex. 479; and Foster v. Mentor Life Assur. Co., 1854, 23 L. J. Q. B. 145.

⁶ Marzetti v. Smith, 1883, 49 L. T. 580 (C. A.).

⁷ Aste v. Stumore, 1884, 13 Q. B. D. 326 (C. A.).

**§§ 1170,
1171.**

proceedings, is now generally applied to all contracts respecting any transaction wherein known usages have prevailed. It rests on the presumption that the parties did not intend to express in writing the whole of the agreement by which they were to be bound, but to make their contract with reference to the established usages and customs relating to the subject-matter.¹ Here, however, it must be borne in mind, that "incidents" are frequently "annexed" to contracts, and conditions implied, not only by the usage or custom of trade, which is always a matter of evidence, but also by the law-merchant (which is judicially noticed without proof²), by the common law,³ and, occasionally, by statute. This whole doctrine of legal implication is, however, abstruse, and the soundest lawyers are often at fault in applying it. On some constantly occurring matters the law has, however, been settled by decisions.

§ 1171. For instance, it now is an undoubted principle of *marine insurance* that a warranty of seaworthiness⁴ at the commencement of the risk is, in the absence of express stipulation, implied,⁵ in every voyage-policy, whether on a ship, on goods, on freight, or on salvage.⁶ In other words, the law annexes to every marine policy, as a necessary incident thereto, the condition that the ship should be seaworthy either at the commencement of the voyage, or in port when preparing for it, or (if the insurance is on a vessel already at sea), that she was seaworthy when the voyage commenced. Other conditions which are equally implied in a policy of marine insurance are conditions not to deviate unnecessarily from the usual course of the voyage, except in order to save life,⁷ to commence it in a reasonable time, and

¹ *Hutton v. Warren*, 1836, 5 L. J. Ex. 234; *Gibson v. Small*, 1853, 4 H. L. C. 396.

² Ante, § 5.

³ *Gibson v. Small*, 1853, 4 H. L. C. 396 (Parke, B.).

⁴ This is a relative term, depending on the nature of the ship, as well as of the voyage insured; and in an action on a policy, parol evidence as to these facts is admissible to show the amount of seaworthiness implied: *Burges v. Wickham*, 1864, 33 L. J. Q. B. 17; *Clapham v.*

Langton, 1865, 34 L. J. Q. B. 46. See, also, *Bouillon v. Lupton*, 1863, 33 L. J. C. P. 37; *Daniels v. Harris*, 1874, L. R. 10 C. P. 1; and *Thin v. Richards*, [1892] 2 Q. B. 141 (C. A.).

⁵ See *Quebec Marine Ins. Co. v. Commer. Bk. of Canada*, 1870, L. R. 3 P. C. 234.

⁶ *Knill v. Hooper*, 1857, 26 L. J. Ex. 377.

⁷ *Scaramanga v. Stamp*, 1880, 5 C. P. D. 295 (C. A.).

§ 1171.

to disclose all material circumstances.¹ The non-performance of any of these conditions, whether fraudulent or not,² avoids the policy. On the other hand, English law implies no warranty in a policy of marine insurance that the lighters employed at the port of discharge to land the cargo shall be seaworthy;³ none that the vessel shall [continue seaworthy after the voyage has commenced; none that an originally competent crew shall continue so; none that the vessel shall be navigated with due care and skill during the voyage; none, where the voyage has already commenced, that pilots shall be taken on board at proper places, unless, perhaps, where required by Act of Parliament; none on an insurance for one voyage out and home, that the ship shall be seaworthy on the return voyage; although these conditions are by law or custom imposed in America.⁴ In the case of a voyage policy upon a steamship, however, where the contemplated voyage must, from its length, be necessarily divided into stages for coaling purposes, there is an implied warranty that the ship shall, at the commencement of each stage of the voyage, be seaworthy for that stage by having on board a sufficiency of coal for that stage.⁵ In the case of a time-policy, the law does not imply, as necessarily incident to the policy, any warranty or condition that the ship should be seaworthy either at the date of the insurance,⁶ or at the commencement of the voyage during which the policy attaches,⁷ and this, too, as it would appear, even where the ship is outward-bound, and starts from a British port where the owner resides.⁸ In a voyage-policy on goods, again, no warranty that the goods are seaworthy for such voyage can be implied.⁹

¹ See *Proudfoot v. Montefiore*, 1867, L. R. 2 Q. B. 511.

² *Gibson v. Small*, 1853, 4 H. L. C. 396. See, also, *Biccard v. Shepherd*, 1861, 14 Moo. P. C. C. 471.

³ *Lane v. Nixon*, 1866, L. R. 1 C. P. 412.

⁴ *Gibson v. Small*, 1853, 4 H. L. C. 397 (Parke, B.). See, also, *Biccard v. Shepherd*, 1861, 14 Moo. P. C. C. 471.

⁵ *Greenock Steamship Co. v. Maritime Insurance Co.*, [1903] 2 K. B. 657.

⁶ *Gibson v. Small*, 1853, 4 H.

L. C. 397.

⁷ *Gibson v. Small*, 1853, 4 H. L. C. 397 (Parke, B., and *Ld. Campbell*); *Jenkins v. Heycock*, 1853, 8 Moo. P. C. C. 351; *Michael v. Tredwin*, 1856, 25 L. J. C. P. 83; *Dudgeon v. Pembroke*, 1877, 2 App. Cas. 284 (H. L.).

⁸ *Thompson v. Hopper*, 1856, 25 L. J. Q. B. 240 (Erle, J., *diss.*); *Fawcus v. Sarsfield*, 1856, 25 L. J. Q. B. 249 (*id.*).

⁹ *Koebel v. Saunders*, 1864, 33 L. J. C. P. 310.

**§§ 1172,
1173-4.**

§ 1172. The law, moreover, annexes to, or implies in, every contract by a common carrier, or by a shipowner,¹ whether a common carrier or not, for the carriage for hire, whether by land² or by water,³ of *goods* (which term includes live animals⁴) an insurance on his part that he will,—unless prevented either by “the act of God or by the public enemies of the Crown,” the “proper vice” of the animal, or the inherent quality of the article,⁵—safely deliver at its destination the property entrusted to him. Consequently, the carrier of goods by land impliedly warrants that his carriage is roadworthy, and the shipowner that his ship is seaworthy.⁶ These rules do not extend to forwarding agents (as distinguished from common carriers), who have made special contracts with their employers.⁷ Neither do they apply to the carriers of *passengers*, who do not impliedly warrant either the roadworthiness of their vehicles, or the seaworthiness of their vessels, so as to render themselves liable for injuries caused by mere *latent* defects,⁸ although bound to exercise the utmost care and skill in the conduct of their business,⁹ and responsible for every accident occasioned by negligence, however slight.¹⁰

§§ 1173-4. Certain implied contracts, as incident thereto, are also, in the absence of express stipulation, annexed by the law to all contracts for the *sale of estates*,¹¹ whether freehold or leasehold. These are on the part of the vendor to the effect that he will

¹ *Nugent v. Smith*, 1876, 1 C. P. D. 423.

² *Riley v. Horne*, 1828, 5 Bing. 533.

³ *Lyon v. Mells*, 1802, 5 East, 428; *Liver Alkali Co. v. Johnson*, 1874, L. R. 9 Ex. 338.

⁴ *McManus v. Lancs. & Yorks. Rail. Co.*, 1859, 28 L. J. Ex. 358; *Nugent v. Smith*, 1876, 1 C. P. D. 423; *Tattershall v. Nat. Steamship Co.*, 1884, 12 Q. B. D. 297.

⁵ *Kendall v. Lond. & S. W. Rail. Co.*, 1872, L. R. 7 Ex. 373; *Blower v. Gt. W. Rail. Co.*, 1872, L. R. 7 C. P. 655; *Nugent v. Smith*, 1876, 1 C. P. D. 423 (C. A.).

⁶ *Kopitoff v. Wilson*, 1876, 1 Q. B. D. 377; *Cohn v. Davidson*, 1877, 2 Q. B. D. 455; *Steel v. State Line Steamship Co.*, 1877, 3 App. Cas. 72 (H. L.). See, also, *Tatter-*

shall v. Nat. Steamship Co., 1884, 12 Q. B. D. 297; and ante, § 187.

⁷ *Scaife v. Farrant*, 1875, L. R. 10 Ex. 358.

⁸ *Readhead v. Midl. Rail. Co.*, 1869, 38 L. J. Q. B. 169; *Buxton v. North East. Rail. Co.*, 1869, L. R. 3 Q. B. 549; *Ingalls v. Bills*, 1845, 9 Metc. 1 (Am.).

⁹ This doctrine was applied to a job-master who had let out a carriage which broke down, in *Hyman v. Nye*, 1881, 6 Q. B. D. 685.

¹⁰ See *John v. Bacon*, 1870, L. R. 5 C. P. 437; *Simpson v. Lond. Gen. Omnibus Co.*, 1873, L. R. 8 C. P. 390.

¹¹ See “The Conveyancing and Law of Property Act, 1861” (44 & 45 V. c. 41), §§ 3, 7.

make out a good title,¹ and on the part of the purchaser to the effect that the damages to which he shall be entitled, if the title prove defective, shall be limited to the expenses actually incurred in the investigation, and shall be merely nominal for the loss of the bargain.² If, indeed, it turn out that the vendor has been guilty of any fraudulent misrepresentation or concealment, or that he has contracted to sell an estate in which he has no reasonable ground for believing that he has any interest whatever,³ or if, though able to furnish a marketable title, he has simply declined to do so, or to take the steps necessary for giving possession,⁴ the case will fall within the general rule of law, that where a person makes a contract and afterwards breaks it, he must pay the whole damage sustained by the party with whom he contracts.⁵ The same result, too, would follow, should the question arise on an executed contract, and the indenture contain a covenant for quiet enjoyment.⁶

§ 1175. Certain implied undertakings and conditions are also annexed by the law to every lease or agreement to lease property. Thus, on the lessor's part every written agreement to grant a lease implies an undertaking that the lessor has title to grant a valid lease,⁷ on every *demise*, whether by deed or parol, the law implies conditions that the lessor will give possession of the premises to the lessee;⁸ and that, provided his own interest in

§§ 1174,
1175.

¹ *Souter v. Drake*, 1834, 5 B. & Ad. 992; *Doe v. Stanion*, 1836, 5 L. J. Ex. 253 (Parke, B.); *Hall v. Betty*, 1842, 11 L. J. C. P. 256; *Worthington v. Warrington*, 1848, 18 L. J. C. P. 350. These cases overrule *George v. Pritchard*, 1826, Ry. & M. 417. See *Kintrea v. Perston*, 1856, 25 L. J. Ex. 287.

² *Flureau v. Thornhill*, 1775-6, 2 W. Bl. 1078; *Walker v. Moore*, 1829, 10 B. & C. 416; *Robinson v. Harman*, 1848, 18 L. J. Ex. 202 (Parke, B.); *Bain v. Fothergill*, 1874, L. R. 7 H. L. 158; *Worthington v. Warrington*, 1849, 18 L. J. C. P. 350; *Pounsett v. Fuller*, 1856, 25 L. J. C. P. 145; *Sikes v. Wild*, 1861, 30 L. J. Q. B. 325; 32 L. J. Q. B. 375.

³ *Hopkins v. Grazebrook*, 1826, 6 B. & C. 31; *Robinson v. Harman*, 1848, 18 L. J. Ex. 202. See *Sikes*

v. Wild, 1861, 30 L. J. Q. B. 325.

⁴ *Engell v. Fitch*, 1869, L. R. 3 Q. B. 314. See *Godwin v. Francis*, 1870, L. R. 5 C. P. 295.

⁵ *Ld. Chelmsford's* opinion in *Bain v. Fothergill*, 1874, L. R. 7 H. L. 207, was that even if a man contracts for the sale of real estate, knowing that he has no title, nor any means of acquiring it, the purchaser cannot recover damages beyond the expenses incurred by an action for breach of contract; he can only obtain other damages by an action for deceit. *Sed. qu.*

⁶ *Lock v. Furze*, 1866, L. R. 1 C. P. 441.

⁷ *Stranks v. St. John*, 1867, L. R. 2 C. P. 376.

⁸ *Coe v. Clay*, 1829, 5 Bing. 440; *Jinks v. Edwards*, 1856, 11 Ex. 775; *Drury v. Macnamara*, 1855, 25 L. J. Q. B. 5.

§ 1175. them continues,¹ the lessee shall have quiet enjoyment of them,² including an inalienable right to kill and take ground game thereon,³ and shall not be evicted during the term.⁴ On the lessee's part every demise, containing no express provision with respect to delivering up the premises, implies a contract not only to go out of them at the termination of the tenancy, but to restore the absolute possession to the landlord.⁵ A demise by parol, however, implies no undertaking for good title;⁶ nor does a lease legally imply any warranty that the subject-matter thereof,—whether house or land,—shall, either at the commencement, or during the continuance, of the term, be in a proper state for habitation or cultivation, or, in other respects, reasonably fit for the purpose for which it is taken.⁷ Neither does the law imply, from the relation of landlord and tenant, either any obligation on the part of the landlord to do substantial repairs on

¹ *Penfold v. Abbott*, 1863, 32 L. J. Q. B. 67; *Adams v. Gibney*, 1830, 6 Bing. 656; *Baynes v. Lloyd*, [1895] 2 Q. B. 610; *Jones v. Lavington*, [1903] 1 K. B. 253.

² *Bandy v. Cartwright*, 1853, 22 L. J. Ex. 285; *Hall v. City of Lond. Brewery Co.*, 1862, 31 L. J. Q. B. 257. See *Howard v. Maitland*, 1883, 11 Q. B. D. 695; as to what constitutes a breach of a covenant for quiet enjoyment. The question whether the word "let" implies any contract for quiet enjoyment has been much discussed, but cannot be considered to be finally determined. See *Jones v. Lavington* and *Baynes v. Lloyd*, supra, and *Budd-Scott v. Daniell*, [1902] 2 Q. B. 351.

³ 43 & 44 V. c. 47 ("The Ground Game Act, 1880"), §§ 1, 3.

⁴ *Parke, B.*, in *Sutton v. Temple*, 1843, 30 L. J. Ex. 17; and in *Hart v. Windsor*, 1843, 13 L. J. Ex. 129.

⁵ *Henderson v. Squire*, 1869, L. R. 4 Q. B. 170.

⁶ *Bandy v. Cartwright*, 1853, 22 L. J. Ex. 285; overruling contrary dicta by *Parke, B.*, in *De Medina v. Norman*, 1842, 11 L. J. Ex. 320; and *Sutton v. Temple*, 1843, 13 L. J. Ex. 17. With respect to Ireland, § 41 of 23 & 24 V. c. 154, Ir., enacts that every lease, made since 1st January, 1861, shall, unless other-

wise expressly provided thereby (see *Leonard v. Taylor*, 1874, Ir. R. 8 C. L. 300), imply an agreement by the landlord that he has a good title, and that the tenant shall have quiet enjoyment. § 42 also enacts, that every such lease shall, unless otherwise expressly provided thereby, imply an agreement by the tenant to pay the rent, and all taxes and impositions payable by the tenant, and to keep the premises in good and substantial repair, and to deliver them up in such repair on the determination of the lease, accidents by fire without the tenant's default excepted.

⁷ *Sutton v. Temple*, 1843, 30 L. J. Ex. 17; *Hart v. Windsor*, 1843, 13 L. J. Ex. 129; *Murray v. Mace*, 1874, Ir. R. 8 C. L. 396; *Manchester Bonded Warehouse Co. v. Carr*, 1880, 5 C. P. D. 507. These cases overrule *Edwards v. Etherington*, 1825, Ry. & M. 268; *Collins v. Barrow*, 1831, 1 M. & Rob. 112; *Salisbury v. Marshall*, 1829, 4 C. & P. 65. In *Erskine v. Adeane*, 1873, 42 L. J. Ch. 395, *Ld. Romilly* held "that every landlord warranted his tenant that he would not keep noxious things (such as yew trees) near the tenant's estate," but this ruling was reversed in *C. A.*, 1873, L. R. 8 Ch. 756.

notice;¹ or a condition—even where the landlord is bound by special agreement to keep the premises in repair during the tenancy,—that the tenant may quit if the repairs be not done.² §§ 1175—1177.

§ 1176. The letting, however, of a *ready furnished* house or of furnished apartments (contrary to the rule in other cases) implies a warranty that the premises are in a reasonably habitable state. Therefore, if the furniture be insufficient, or defective, or the beds badly infested with vermin, or the drains out of order, or the house infected with contagion, the tenant may quit without notice, unless,³ perhaps, in the event of his having had an opportunity of inspecting the premises by himself or his agent before entering on the occupation. This warranty, however, applies only to the state of the premises at the commencement of the tenancy, and there is no implied agreement that the premises shall continue fit for habitation during the term.⁴

§ 1177. The law of England, moreover, now, like the Roman,⁵ the French,⁶ the Scotch,⁷ and, in part, the American law,⁸—on the sale or letting of a specific ascertained chattel annexes, as incident to the contract, an implied warranty of *title* and against incumbrances.⁹ Even before this was expressly enacted, a warranty might have been inferred either from the usage of trade, from the vendor's declarations, or from his conduct being such as to lead to the conclusion that he sold the property as "his own," or from the fact of the articles being bought in a shop professedly carried on for the sale of goods.¹⁰ The rule, such as it was, had in truth already been nearly eaten up by the

¹ *Gott v. Gandy*, 1853, 2 E. & B. 845.

² *Surplice v. Farnsworth*, 1844, 13 L. J. C. P. 215.

³ *Smith v. Marrable*, 1843, 12 L. J. Ex. 223; commented on by *Ld. Abinger*, in *Sutton v. Temple*, 1843, 13 L. J. Ex. 17; and approved in *Wilson v. Finch Hatton*, 1877, 2 Ex. D. 336.

⁴ *Sarson v. Roberts*, [1895] 2 Q. B. 395 (C. A.).

⁵ See *Domat*, bk. 1, tit. 2, § 2, art. 3.

⁶ Code Civil, c. 4, § 1, art. 1603.

⁷ *Bell on Sale*, 94.

⁸ *Defreeze v. Trumper*, 1806, 1

Johns, 274 (Am.); *Rew v. Barber*, 1824, 3 Cowen, 272 (Am.).

⁹ See "The Sale of Goods Act, 1893" (56 & 57 V. c. 71), § 12. As to the old law under which there was no implied warranty, see *Morley v. Attenborough*, 1849, 18 L. J. Ex. 148 (Parke, B.); *Ormrod v. Huth*, 1845, 14 L. J. Ex. 366 (Tindal, C.J.); *Hall v. Conder*, 1857, 26 L. J. C. P. 251; *Chapman v. Speller*, 1850, 19 L. J. Q. B. 239; *Bagueley v. Hawley*, 1867, L. R. 2 C. P. 625.

¹⁰ *Morley v. Attenborough*, 1849, 18 L. J. Ex. 148 (Parke, B.); *Eicholz v. Bannister*, 1864, 34 L. J. C. P. 105.

§§ 1177— exceptions.¹ Moreover, on *executory* contracts of purchase and
 1178. sale, where the subject is *unascertained*, and is afterwards to be conveyed, even the old law probably implied that both parties meant that a good title to that subject should be transferred, in the same manner as, under similar circumstances, it would imply that a merchantable article was to be supplied; for unless goods which the party could enjoy as his own, and make full use of, were delivered, the contract would not be performed. The purchaser could not be bound to accept goods if he discovered a defect in their title before delivery; since, if he did accept, and the goods were recovered from him, he would not be bound to pay for them, or having paid, he would be entitled to recover back the price, as on a consideration which had failed.²

§ 1177A. By statute, the custom of trade may annex an implied warranty or condition *as to quality or fitness for a particular purpose* to a sale of goods.³

§ 1178. If the buyer of goods expressly, or by implication, make known to the seller the particular purpose for which they are required, so as to show that he relies on the seller's skill and judgment, and the goods are of a description which it is the seller's business to supply, there is (except in the case of patent goods, or goods sold under a trade name) by statute an implied condition that the goods shall be reasonably fit for the purpose for which they are bought.⁴ Where, too, goods are bought by description from a seller who deals in goods of that description (whether a manufacturer of them or not), there is an implied condition that the goods shall be of merchantable quality, provided that if the buyer has examined the goods, there is no warranty as regards defects which the examination ought to have revealed.⁵ Subject to the above enactment, where on a sale the purchaser has been afforded an opportunity of inspecting either the bulk or

¹ *Sims v. Marryat*, 1851, 20 L. J. Q. B. 454 (Ld. Campbell); *Eicholz v. Bannister*, 1864, 34 L. J. C. P. 105 (Erle, C.J., and Byles, J.).

² *Morley v. Attenborough*, 1849, 18 L. J. Ex. 148 (Parke, B.). It is still undecided whether, on the sale of a *copyright*, the law would imply a warranty of title. See *Sims v. Marryat*, 1851, 20 L. J. Q. B. 454.

³ See "The Sale of Goods Act, 1893" (56 & 57 V. c. 71), § 14, sub-s. 3.

⁴ *Id.*, sub-s. 1.

⁵ *Id.*, sub-s. 2. As to the former law, see *Wieler v. Schillizzi*, 1856, 25 L. J. C. P. 89; *Bigge v. Parkinson*, 1862, 31 L. J. Ex. 301; *Beer v. Walker*, 1877, 46 L. J. C. P. 677.

the sample, the maxim *caveat emptor* generally applies, and the law does not imply any warranty,¹ either as to merchantable quality,² or value,³ or fitness for the purpose for which such goods were bought,⁴ unless the defect be of such a nature as not to be readily discoverable by the inspection of the bulk or the sample.⁵ This doctrine even extends to the sale of food for the use of man,⁶ unless the vendor be a butcher, baker, vintner, or common victualler, in which case he will perhaps be presumed to have warranted that the provisions supplied by him were sound and wholesome.⁷ Even a sale *in a market* of a herd of animals, which the vendor has reason to believe were diseased (although by thus publicly exposing the animals for sale, his conduct might have been morally, or even statutably,⁸ culpable), does not render him liable to an action by a purchaser for false representation where such animals are sold under an express condition that they are to be "taken with all faults," and without any warranty.⁹

§ 1179. No warranty is generally implied by the law from the execution by a manufacturer of a specific order for a *known and ascertained* chattel ordered by the buyer, that the article supplied shall be fit for the special purpose to which it is intended to be applied.¹⁰ But such a warranty *is* implied by law where it may fairly be inferred that the purchaser, instead of depending on his own judgment, relied on the skill and knowledge of the vendor,¹¹

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1179.

¹ See 56 & 57 V. c. 71 ("The Sale of Goods Act, 1893"), § 14.

² Independently, however, of the law of implied warranty, a party is not bound to accept and pay for chattels, unless they really answer the *description* of the articles which the vendor professed to sell, and the purchaser intended to buy: *Gompertz v. Bartlett*, 1853, 23 L. J. Q. B. 65; *Nichol v. Gedts*, 1854, 23 L. J. Ex. 314; *Young v. Cole*, 1837, 6 L. J. C. P. 201; *Hall v. Conder*, 1857, 26 L. J. C. P. 251; *Josling v. Kingsford*, 1863, 32 L. J. C. P. 94.

³ *Kirkpatrick v. Gowan*, 1875, Ir. R. 9 C. L. 251. See *Smith v. Hughes*, 1871, L. R. 6 Q. B. 597.

⁴ *Parkinson v. Lee*, 1802, 2 East, 314; recognised (*Parke, B.*) in *Sutton v. Temple*, 1843, 13 L. J. Ex. 17; and explained (*Tindal, C.J.*) in *Shep-*

herd v. Pybus, 1842, 11 L. J. C. P. 101.

⁵ *Mody v. Gregson*, 1868, L. R. 4 Ex. 49.

⁶ *Burnby v. Bollitt*, 1847, 17 L. J. Ex. 190; *Le Nouville v. Nourse*, 1813, 3 Camp. 351; *Emmerton v. Matthews*, 1862, 31 L. J. Ex. 139.

⁷ *Burnby v. Bollitt*, 1847, 17 L. J. Ex. 190 (*Parke, B.*).

⁸ See 57 & 58 V. c. 57 ("The Diseases of Animals Act, 1894"), § 52.

⁹ *Ward v. Hobbs*, 1878, 4 App. Cas. 13 (H. L.).

¹⁰ *Chanter v. Hopkins*, 1838, 4 M. & W. 399; *Ollivant v. Bayley*, 1843, 13 L. J. Q. B. 34; recognised *Parsons v. Sexton*, 1847, 16 L. J. C. P. 181; *Prideaux v. Bunnnett*, 1857, 1 C. B. (N.S.) 613; *Hall v. Conder*, 1857, 26 L. J. C. P. 251.

¹¹ See "The Sale of Goods Act,

§§ 1179— and no exception will be recognised in the case of latent undiscoverable defects.¹ This doctrine specially applies to cases where the articles are supplied directly by the manufacturer;² and sometimes extends to natural products as well as to manufactured articles, so that in a case where a seed-dealer had sold some rape, knowing that the purchaser required it for seed, the contract was held to contain an implied warranty that the rape was good growing seed, fit for germination.³

1180.

§ 1179A. Prior to the Sale of Goods Act, 1893, it was held that on a sale of goods by a manufacturer of such goods, who is not otherwise a dealer in them, in the absence of any usage, in the particular trade or as regards the particular goods, to supply goods of other makers, there was an implied contract that the goods supplied shall be of the manufacturer's own make.⁴ No similar provision, however, is contained in the Act.

§ 1179B. Upon a contract to let chattels for a particular purpose by a person who deals in or whose business it is to let such chattels there is an implied warranty that the articles let shall be reasonably fit for the purpose for which they are supplied; thus a job-master has been held liable for injuries resulting from the breaking down of a carriage let by him, in consequence of a latent defect,⁵ and a person letting out gear for unloading a ship, for injuries resulting from the defective condition of the gear supplied.⁶

1180. The vendor of any article with a trade mark or description upon it, is also, by the Merchandise Marks Act, 1887, presumed to have contracted that the mark is genuine and the description true, "unless the contrary shall be expressed in some

1893" (56 & 57 V. c. 71), § 14 (3). *Bigge v. Parkinson*, 1862, 31 L. J. Ex. 301; *Brown v. Edgington*, 1841, 10 L. J. C. P. 66; recognised in *Sutton v. Temple*, 1843, 13 L. J. Ex. 17; *Mallon v. Radloff*, 1864, 17 C. B. (N.S.) 588.

¹ *Randall v. Newsom*, 1877, 2 Q. B. D. 102 (C. A.).

² *Shepherd v. Pybus*, 1842, 11 L. J. C. P. 101; *Sutton v. Temple*, 1843, 13 L. J. Ex. 17 (Parke, B.).

³ *Shiels v. Cannon*, 1865, 16 Ir. C. L. R. 588; *Jones v. Just*, 1868,

L. R. 3 Q. B. 197.

⁴ *Johnson v. Raylton*, 1881, 7 Q. B. D. 438 (Bramwell, L.J., diss.) (C. A.). § 14 of "The Sale of Goods Act, 1893," as originally drafted contained a clause to the same effect; the provision was, however, cut out by the Lords Select Committee.

⁵ *Hyman v. Nye*, 1881, 6 Q. B. D. 685.

⁶ *Mowbray v. Merryweather*, [1895] 2 Q. B. 640; *Vogan v. Oulton*, 1899, 81 L. T. 435.

writing signed by or on behalf of the vendor, and delivered to and accepted by the vendee."¹ §§ 1180—1182.

§ 1181. After much discussion, it is now determined, however, that the law implies no warranty on a contract for the sale of a patent, either that the vendor was the true and first inventor within the Statute of James, or that the invention was either useful or new.²

§ 1182. The common law, too (as distinguished from the Employers' Liability Act), does not imply, from the ordinary relation of *master* and *domestic* or *menial servant*, any contract on the master's part to protect his servant against injury arising, either from the negligence of another servant, or from the defective condition of the master's property, unless it can be shown, either that the personal negligence or other misconduct of the master, was the cause of the accident,³ or that the master knew of the danger while the servant did not.⁴ This doctrine is still applicable to the masters of domestic or menial servants. But the liability of most employers, other than those of domestic or menial servants, for personal injuries suffered by workmen in their service, has been altered by the Employers' Liability Act.⁵ The first three sections of that statute are the most important, but are too long to insert in this work. It should, however, be noted, 1st, that the Act does not apply, either to domestic servants or to seamen; 2nd, that "employer," as used in it, "includes a body of persons corporate or unincorporate;" and, 3rd, that the expression "workman," includes a railway servant, and any person of any age, who,—being a labourer, servant in husbandry, journeyman, artificer, handicraftsman, miner, or otherwise engaged in manual labour,—has entered into or works under a contract with an employer, whether such contract be express or implied, oral or in writing, and be a contract of service, or a contract personally to execute any work or labour.⁶ In

¹ 50 & 51 V. c. 28, § 17.

² Hall v. Conder, 1857, 26 L. J. C. P. 251; Smith v. Neale, 1857, 26 L. J. C. P. 143; Notor v. Brooks, 1861, 7 H. & N. 499; Trotman v. Wood, 1864, 16 C. B. (N.S.) 479.

³ Priestley v. Fowler, 1837, 3 M. & W. 1; Seymour v. Maddox,

1851, 20 L. J. Q. B. 327.

⁴ Griffith v. London, &c. Docks Co., 1884, 13 Q. B. D. 259 (C. A.).

⁵ 43 & 44 V. c. 42, continued till 31st Dec., 1905, by 4 Ed. VII. c. 29 ("The Expiring Laws Continuance Act, 1904").

⁶ See 38 & 39 V. c. 90 ("The Em-

**§§ 1182,
1182a.**

consequence of this last definition, the Act does not apply to an omnibus conductor,¹ the driver of a tramcar,² nor to a grocer's assistant.³ In addition to the liabilities under the Employers' Liability Act, it should be mentioned that by the provisions of the Workmen's Compensation Acts, 1897 and 1900,⁴ employers of labour are now in many cases liable to compensate their employees for injuries arising out of and in the course of their employment, although such injuries may have been occasioned without any negligence on the part of the employer or a fellow servant.

§ 1182A. The law, again, as regards seamen and sea apprentices, is governed by "The Merchant Shipping Act, 1894,"⁵ which enacts that, "(1) In every contract of service, express or implied, between the owner of a ship and the master or any seaman thereof, and in every instrument of apprenticeship whereby any person is bound to serve as an apprentice on board any ship, there shall be implied, notwithstanding any agreement to the contrary, an obligation on the owner of the ship, that the owner of the ship, and the master, and every agent charged with the loading of the ship, or the preparing thereof for sea, or the sending thereof to sea, shall use all reasonable means to insure the seaworthiness of the ship for the voyage at the time when the voyage commences, and to keep her in a seaworthy condition for the voyage during the same: (2) Nothing in this section (a) shall subject the owner of a ship to any liability by reason of the ship being sent to sea in an unseaworthy state, where, owing to special circumstances, the so sending thereof to sea is reasonable and justifiable; or (b) shall apply to any ship employed exclusively in going from place to place in any river or inland water of which the whole or part is in any British possession." The above section apparently makes the burthen of proof of unseaworthiness rest on the ship-owner, and obliges him to show that he has used "all reasonable means to insure the seaworthiness of the ship."

ployers and Workmen Act, 1875," § 10; and 43 & 44 V. c. 42 ("The Employers' Liability Act, 1880"), § 8.

¹ *Morgan v. Lond. Gen. Omnibus Co.*, 1884, 12 Q. B. D. 203 (C.A.).

² *Cook v. North Metropolitan*

Tramways Co., 1887, 18 Q. B. D. 683.

³ *Bound v. Lawrence*, [1892] 1 Q. B. 226.

⁴ 60 & 61 V. c. 37, and 63 & 64 V. c. 22.

⁵ 57 & 58 V. c. 60, § 458.

§ 1183. To return to the subject of warranties annexed by the common law to certain contracts. The law implies a warranty by every artisan, artist, or presumably skilled labourer who enters into an engagement with an employer to work as such, that he possesses skill reasonably competent to the task he undertakes; as in the case of, e.g., an apothecary, a surveyor, a watchmaker, a cook, an auctioneer,¹ or a solicitor, employed for reward. No express promise or representation is necessary, for the public profession of an art is in itself a representation and undertaking to all the world that the professor possesses the requisite ability and knowledge.² If, therefore, the party employed proves incompetent, he may, though engaged for a term, be immediately discharged,³ and his employer may also proceed against him for any loss occasioned by his ignorance or incapacity.⁴ §§ 1183—1185.

§ 1184. The common law, too, annexes as an incident to every contract to perform personal services,—as, for instance, to a covenant by an apprentice to serve his master for a certain period,—however absolute and unconditional may be the terms employed, a condition that the contractor shall be excused from the performance of his contract in the event of his becoming disabled by the act of God, as by death or permanent illness, from doing what he has undertaken to do.⁵ Thus, unless there be an express stipulation to the contrary, the death of the master terminates the service of a farm-bailiff.⁶ Consequently, inability from illness to perform it, discharges an undertaking by an author to write a book, by an artist to paint a picture within a certain time, or by a musician to play at a concert.⁷

§ 1185. Again, the law implies a warranty by a man who makes a contract as agent for another that he has authority to bind his principal. Therefore, if the agent turn out to have really no such authority as he has assumed to possess, or if he has made any misrepresentation in point of fact, as distinguished

¹ *Kavanagh v. Cuthbert*, 1874-5, Ir. R. 9 C. L. 136.

² *Harmer v. Cornelius*, 1858, 28 L. J. C. P. 88 (Willes, J.).

³ *Id.*

⁴ *Jenkins v. Betham*, 1854, 24 L. J. C. P. 94.

⁵ *Boast v. Firth*, 1868, L. R. 4 C. P. 1.

⁶ *Farrow v. Wilson*, 1869, L. R. 4 C. P. 744.

⁷ *Robinson v. Davison*, 1871, L. R. 6 Ex. 269.

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1189.

imported into a contract, though proof has been given of exceptions to such usage.¹ Parties connected with a trade will also be presumed to have contracted with a reference to all usages which since its existence have prevailed in such trade, although that particular branch of it has been only established for a year or two.² It is, however, the *fact* of a general usage or practice prevailing in the particular trade or business, and not the mere opinion of the witnesses, which is admissible in evidence: and unless the witnesses can state instances of the usage as having occurred within their own knowledge, their testimony will seldom be entitled to much weight.³ A custom of trade however, to affect persons who know nothing of the custom and do not deal in the particular market, must be a custom known in business generally and not merely to persons dealing in the particular market; thus a custom by which goods are left in the possession of persons to whom they do not belong, must, in order to exclude the doctrine of reputed ownership, be a custom known in business generally, and not merely to persons dealing in the market in which the custom applies.⁴

§ 1189. Whenever evidence of usage is adduced, whether in order to explain the technical language of an instrument, or to annex incidents to it, the party against whom it is offered is always at liberty to prove,—either first, the non-existence of the usage,—or secondly, its illegality or unreasonableness,—or thirdly, that, in fact, it formed no part of the agreement between the parties.⁵ Indeed, “a party may properly . . . anticipate objections, and introduce evidence of this sort, which, if he delayed to produce at that moment, would afterwards be shut out.”⁶

¹ Vallance v. Dewar, 1808, 1 Camp. 508.

² Noble v. Kennoway, 1780, 2 Doug. 513; Robertson v. Jackson, 1845, 15 L. J. C. P. 28.

³ Lewis v. Marshall, 1844, 13 L. J. C. P. 193. Formerly, in America, a custom could not be established by merely the evidence of a single witness; but it is now settled in that country that the fact that there is only a single witness to an alleged contract goes only to his credibility with the jury, and not to his com-

petency in point of law: Jones v. Hoey, 1880, 128 Mass. 585 (Am.); Robinson v. U. S., 1871, 80 U. S. 363 (Am.); Vail v. Rice, 1851, 1 Seld. (N. Y.) 155 (Am.); Greenleaf, 15th edit., 1892, p. 355.

⁴ Goetz, Jonas & Co., In re, [1898] 1 Q. B. 787 (C. A.).

⁵ Bourne v. Gatcliffe, 1841, 3 Scott. N. R. 1. See, also, Bottomley v. Forbes, 1838, 6 Scott. 816; Fawkes v. Lamb, 1862, 31 L. J. Q. B. 98.

⁶ Bourne v. Gatcliffe, 1844, 11 Cl. & Fin. 45 (Ld. Brougham) (H. L.).

§ 1190. Much injustice is, it is feared, occasioned by a lax habit of admitting evidence of usage, which, though ostensibly received for the purpose of explaining a written contract or other instrument, has too often the effect of putting a construction upon it never contemplated by the parties themselves, and utterly at variance with their real intentions. In this view some of the highest legal authorities both in England and America concur. The judges of the old Court of Exchequer once so said,¹ and the same opinion was expressed more than once by the old Court of Queen's Bench.²

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1194.

§ 1191. Moreover, the expediency of the rule itself was questioned in a judgment of Lord Denman in the last-named court.³

§ 1192. In America, the late Story, J., too, expressed similar views.⁴

§ 1193. Not only, however, is evidence of usage, strictly so called, admissible under the rule laid down⁵ and discussed⁶ above, but it further almost seems that where a written agreement is expressed in short and incomplete terms, or contains words of indeterminate signification, witnesses, present at the time of its being made, may be called to explain that which is per se unintelligible; such explanation not being inconsistent with the written terms.⁷ Even conversations between the parties when the contract was being made, have, on one or two occasions, been received, in proof of the sense which they attached to the ambiguous expressions.⁸ The principle of these cases is, however, not very clear, and no great weight should be attached to them.⁹

§ 1194. Some time ago¹⁰ it was pointed out that evidence in explanation of written instruments might be received, first, if

¹ See *Hutton v. Warren*, 1836, 5 L. J. Ex. 234. See, also, *Anderson v. Pitcher*, 1800, 2 Bos. & P. 164 (Ld. Eldon).

² *Johnston v. Usborne*, 1840, 11 A. & E. 549; *Trueman v. Loder*, 1840, 11 A. & E. 600.

³ *Trueman v. Loder*, 1840, 11 A. & E. 600.

⁴ *The Schooner Reeside*, 1837, 2 Sumn. 567 (Am.).

⁵ *Supra*, § 1168.

⁶ *Supra*, §§ 1168-89.

⁷ *Sweet v. Lee*, 1841, 3 M. & Gr. 452, as, for instance, to show who are meant by "S. and others" in an agreement: *Herring v. Boston Iron Co.*, 1854, 1 Gray (Mass.) 134 (Am.).

⁸ *Birch v. Depeyster*, 1816, 1 Stark. R. 210; *Gray v. Harper*, 1841, 1 Story, R. 574 (Am.); *Selden v. Williams*, 1839, 9 Watts, 9 (Am.).

⁹ See *Smith v. Jeffries*, 1846, 15 L. J. Ex. 325.

¹⁰ § 1158.

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such instrument was doubtful, or, secondly, where the person or things to which it relates require identification. The first branch of this rule has now been fully dealt with. Passing to the second, it may be said broadly that *extrinsic evidence* of every *material fact*, which will enable the court to ascertain the *nature and qualities* of an instrument, or, in other words to *identify the persons* to whom *and the things* to which the instrument refers, must of necessity be received.¹ To discover the intention of the writer of an instrument, as evidenced by the words he has used, is always the object; and the judge must put himself in the writer's place, and then see how the terms of the instrument affect the property or subject-matter.² With this view, extrinsic evidence of all the circumstances surrounding the author of the instrument is admissible.³ In the simplest case that can be put, namely, that of an instrument appearing on its face to be perfectly intelligible, inquiry must be made for a subject-matter to satisfy the description. If an estate be conveyed as "Blackacre," parol evidence must be admitted to show what property is known by that name;⁴ and if a testator devise a house or a farm described as purchased of A., or in the occupation of B., or called "Cleeve Court," it must be shown by extrinsic evidence what house or farm was purchased of A., or was in B.'s occupation, or was called "Cleeve Court," before it can be shown what is devised.⁵

¹ Bank of New Zealand v. Simpson, [1900] A. C. 182; Grahame v. Grahame, 1887, 19 L. R. Ir. 249. Accordingly, parol evidence may be admitted to show that a mortgage was only intended to stand as a security for certain moneys. See Trench v. Doran, 1887, 20 L. R. Ir. 338; Doe v. Hiscocks, 1839, 9 L. J. Ex. 27; Shore v. Wilson, 1842, 9 Cl. & Fin. 355, 556 (Parke, B.) (H. L.); Wigr. Wills, 65; Doe v. Martin, 1833, 4 B. & Ad. 771, 785; R. v. Wooldale, 1844, 14 L. J. M. C. 13. See Macdonald v. Longbottom, 1860, 28 L. J. Q. B. 293; 29 L. J. Q. B. 256; Mumford v. Gething, 1859, 29 L. J. C. P. 105; Chambers v. Kelly, 1873, Ir. R. 7 C. L. 231; McCollin v. Gilpin, 1881, 6 Q. B. D. 516.

² Shore v. Wilson, 1842, 9 Cl. & Fin. 355, 556 (Parke, B.) (H. L.); Doe v. Martin, 1833, 4 B. & Ad. 771

(id.); Guy v. Sharp, 1833, 1 Myl. & K. 602 (Id. Brougham); Wigr. Wills, 88.

³ Sweet v. Lee, 1841, 3 M. & Gr. 452; Att.-Gen. v. Drummond, 1842, 1 Dr. & War. 353 (Sugden, C.); Drummond v. Att.-Gen., 1849, 2 H. L. C. 862 (Ir.) (Id. Brougham); Att.-Gen. v. Earl of Powis, 1853, 24 L. J. Ch. 218; King's Coll. Hospital v. Wheildon, 1854, 23 L. J. Ch. 537; Blundell v. Gladstone, 1843, 12 L. J. Ch. 225; Simpson v. Margitson, 1847, 17 L. J. Q. B. 81 (Id. Denman); Roden v. London Small Arms Co., 1877, 46 L. J. Q. B. 213.

⁴ Ricketts v. Turquand, 1848, 1 H. L. C. 472.

⁵ Sanford v. Raikes, 1816, 1 Mer. 653; Clayton v. Ld. Nugent, 1844, 13 M. & W. 205; Castle v. Fox, 1871, L. R. 11 Eq. 542.

§ 1195. To put an instance somewhat more complex ; if the terms be vague and general, or have divers meanings, parol evidence will always be admissible of any *extrinsic circumstances* tending to show what person or persons,¹ or what things, were intended by the party, or to ascertain his meaning in any other respect. Thus, where a testatrix bequeathed a sum of money to another "for the charitable purposes agreed upon between us," evidence was admitted to show what the purposes agreed upon were.² So also, a court which has to determine whether a bequest of *stock* is specific or pecuniary, will not only look to the context of the will, and the terms of the gift, as compared with those of the other bequests, but will receive evidence of the state of the testator's funded property.³ Again, where an assignment by deed stated that the particulars were set forth in an inventory annexed, the fact of no inventory being found does not invalidate the deed, but extrinsic evidence is admissible to identify the chattels ;⁴ where a will directs that all moneys advanced to his children, "as will appear in a statement in my handwriting," should be brought into hotchpot, not only is extrinsic evidence of the nature and amount of the advances admissible, but so is even an unattested document, drawn up by the testator after the date of the will, with the apparent view of furnishing a guide to his trustees ;⁵ and parol evidence is even admissible to identify an imperfectly executed testamentary paper, if the object be to incorporate that document with a duly-attested codicil, which refers in general terms to the testator's "last will."⁶

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1196.

§ 1196. A codicil of the distinguished sculptor, Nollekens,

¹ See *Grant v. Grant*, 1870, L. R. 5 C. P. 727.

² In *re Huxtable*, [1902] 2 Ch. 793 (C. A.) ; In *re Fleetwood*, 1880, 15 Ch. D. 594 (Hall, V.-C.). But see In *re Hetley*, [1902] 2 Ch. 866, where Joyce, J., held that a *power of appointment* given by a testator to his wife to dispose of his estate by her will or in her lifetime "in accordance with my wishes verbally expressed by me to her" was void for uncertainty, and parol evidence was inadmissible to show what the verbally expressed wishes were.

³ *Att.-Gen. v. Grote*, 1827, 2

Russ. & Myl. 699 (Ld. Eldon) ; *Boys v. Williams*, 1831, 2 Russ. & Myl. 689 (Ld. Brougham) ; *Horwood v. Griffith*, 1854, 23 L. J. Ch. 465.

⁴ *England v. Downs*, 1840, 2 Beav. 523, 536. But see now "The Bills of Sale Act, 1882" (45 & 46 V. c. 42), § 4.

⁵ *Whateley v. Spooner*, 1857, 3 K. & J. 542. But see *Smith v. Conder*, 1878, 9 Ch. D. 170.

⁶ *Allen v. Maddock*, 1858, 11 Moo. P. C. C. 427 ; In *re Almosnino*, 1860, 29 L. J. P. & M. 46 ; ante, § 1061.

§§ 1196,
1197.

occasioned a dispute arising from this doctrine.¹ "In case of my death all the marble in the yard, the tools in the shop, bankers, *mod* tools for carving," &c., "shall be the property of Alex. Goblet." The legatee contended that "mod" meant "models;" the executor urged that either it was an abbreviation for "moulds," or that it should be read in connexion with the words which immediately followed it, and meant "modelling tools for carving." On the one hand the legatee was proved to have been in the testator's service for thirty years, and highly esteemed by him as one of his best workmen; while statuaries proved that no such tools were known as modelling tools for carving, but that "mod" would be understood by any sculptor as a simple abbreviation of the word models. On the other hand, the executor showed that the testator's models were rare and curious works of art, which had sold for a large sum, but that all the other articles mentioned in the codicil were of trifling value; and he further showed that the testator had a great number of moulds in his possession, which were not specifically disposed of by the will. On this evidence "mod" was decided by a V.-C. to mean "models."² In another case, a testator bequeathed to his two children the several sums of "i.x.x." and "o.x.x." These marks were allowed to be explained by extrinsic evidence, that the deceased had, in his business of a jeweller, used them respectively as denoting 100*l.* and 200*l.*³

§ 1197. Again, it is obvious, that unless it were first made acquainted with the circumstances surrounding a testator, a court could not with safety undertake to construe his will.⁴ Thus, in many testamentary dispositions, one construction would be given to particular words, if children were living at the time the will was executed; and another construction, if no child was alive at that period. If a man were to make an ambiguous settlement

¹ Goblet v. Beechey, 1829, 3 Sim. 24.

² The case was ultimately decided not to turn upon the admissibility of this evidence, but on the ground that the models had been distinctly bequeathed by the will to another party, and that the meaning of the codicil was involved in too much

obscurity to justify its operating as a revocation of the prior bequest: Goblet v. Beechey, 1831, 3 Sim. 24.

³ Kell v. Charmer, 1856, 23 Beav. 125.

⁴ Sugden, C, in Att.-Gen. v. Drummond, 1842, 1 Dru. & War. 367 (Ir.).

for his children, it might be impossible to solve the doubt, until evidence had been adduced respecting the state of the settlor's family, and the circumstances in which he was placed in relation to the property dealt with.¹ Parol evidence will, too, always be admissible to show what passed as parcel thereof on a conveyance or devise of an estate, a house, a mill, a factory, or a farm, eo nomine, by proof of the situation and limits of the property, the manner in which it was acquired, or occupied, and the like.² Parol evidence of the circumstances under which it was given, and to explain the ambiguity, will also be received if the language of a guarantee leaves it doubtful whether the consideration mentioned therein be a *past* or *present* consideration, and, consequently, whether the instrument be invalid or valid,³ unless, indeed, the court, without the aid of any extrinsic proof, in the first instance adopt that construction which supports the validity of the instrument, and casts upon the party objecting to the guarantee the burthen of producing evidence to show that it was void.⁴

§§ 1197,
1198.

§ 1198. It often happens that, in consequence of the surrounding circumstances being proved, the courts give an instrument, thus relatively considered, a very different interpretation from that which it would have received, had it been considered in the abstract. The effect of proof of surrounding circumstances is, however, not to vary the language employed, but merely to explain the sense in which the writer understood it. For example, a contract or other instrument, susceptible of both meanings, but which *prima facie* seems to have created a joint-tenancy, may be construed as having simply established a tenancy in common, if

¹ *Id.*

² *Doe v. Martin*, 1833, 4 B. & Ad. 771, 785; *Doe v. Burt*, 1787, 1 T. R. 701; *Castle v. Fox*, 1871, L. R. 11 Eq. 542; *Webb v. Byng*, 1855, 1 K. & J. 580; *Doe v. Ld. Jersey*, 1825, 3 B. & C. 870 (H. L.); *Oke-den v. Clifden*, 1826, 2 Russ. 309; *Kopps v. Barker*, 1826, 4 Pick. 239 (Am.); *Farrar v. Stackpole*, 1829, 6 Greenl. 154 (Am.).

³ *Goldshede v. Swan*, 1847, 16 L. J. Ex. 284, and cases there cited; *Edwards v. Jevons*, 1849, 19 L. J.

C. P. 50; *Colbourn v. Dawson*, 1851, 20 L. J. C. P. 154; *Bainbridge v. Wade*, 1850, 20 L. J. Q. B. 7; *Hoad v. Grace*, 1862, 31 L. J. Ex. 98; *Wood v. Priestner*, 1866, 36 L. J. Ex. 42; *Heffield v. Meadows*, 1869, L. R. 4 C. P. 596.

⁴ *Steele v. Howe*, 1849, 19 L. J. Q. B. 89; *Broom v. Batchelor*, 1856, 25 L. J. Ex. 299. See *Mare v. Charles*, 1856, 25 L. J. Q. B. 119; and, also, 19 & 20 V. c. 97 ("The Mercantile Law Amendment Act, 1856"), § 3, cited ante, § 1030.

§§ 1198,
1199.

it can be shown, not indeed by parol testimony of intention, but by evidence of the acts and dealings of the parties, and of the surrounding circumstances, that the latter construction is that which the instrument must have been originally intended to bear;¹ verbal evidence that a cellar under the yard was at the time of the lease in the occupation of a third party may be admitted to show that a lease which included a yard described by the metes and bounds, could not have been intended to pass such cellar;² a devise of all testator's "lands in the parish of Doynton" passed a farm, which subsequently turned out to be partly in another parish, but which was at the date of the will generally reputed to be wholly in Doynton;³ and though the estate at Chelsea of a conusor of a fine levied for twenty acres of land and twelve messuages in Chelsea, was under twenty acres, verbal evidence that he had nineteen houses on it was admitted; while since read in connexion with these facts, the fine was ambiguous, further verbal evidence was allowed to show that a particular part of the property was intended to be included in the fine.⁴

§ 1199. The same principle was applied where an estate was devised to Mary Beynon's three daughters, Mary, Elizabeth, and Ann. At the date of the will, Mary Beynon had two legitimate daughters, namely, Mary and Ann, and an illegitimate daughter, named Elizabeth. To rebut the claim of the illegitimate daughter Elizabeth, extrinsic evidence was admitted showing that Mary Beynon had formerly had a legitimate daughter named Elizabeth, who had been born in the order stated in the will; that, though this daughter had died several years before the date of the will, her death was unknown to the testator, who had also been studiously kept in ignorance of the birth of the natural child; and under these circumstances a jury were held to have rightly decided that the illegitimate Elizabeth was not entitled.⁵

¹ *Harrison v. Barton*, 1861, 30 L. J. Ch. 213.

² 2 Poth. Obl. 185; *Doe v. Burt*, 1787, 1 T. R. 701.

³ *Anstee v. Nelms*, 1853, 26 L. J. Ex. 5.

⁴ *Doe v. Wilford*, 1824, 1 C. & P. 284; *Denn v. Wilford*, 1826, 2 C. & P. 173.

⁵ *Doe v. Beynon*, 1840, 12 A. & E. 431; *Phillips v. Barker*, 1854, 23 L. J. Ch. 44. See, also, *supra*, § 1165.

§ 1200. Again, where an order of removal has been quashed generally by Sessions, on the trial of an appeal against a subsequent order of removal, the removing parish may show by parol evidence the state of things when the first order was quashed, and that the Sessions, in quashing it, intended to pronounce no decision on the merits of the settlement.¹ *Primâ facie*, indeed, an order of Sessions quashing an order of removal is evidence that the pauper was not settled in the appellant parish.² But the respondents may prove the particular ground on which the decision rested.¹

§§ 1200—
1202.

§ 1201. Moreover, although evidence of all the circumstances surrounding the author of a written instrument, will be received to ascertain his intentions, yet those intentions must ultimately be determined by the *language* of the instrument, as explained by the extrinsic evidence; and no proof (however conclusive), can be admitted, with a view of setting up an intention inconsistent with the known meaning of the writing itself.³ The duty of the court in all cases is to ascertain, not what the parties may have really intended, as contradistinguished from what their words express; but simply, what is the meaning of the words they have used.⁴ The duty is merely that of interpretation; that is, to find out the true sense of the written words, *as the parties used them*; and of construction, that is, when the true sense is ascertained, *to subject the instrument to the established rules of law*.⁵

§ 1202. Therefore, in no case is it permitted to explain the language of a written instrument by evidence of the private views, the secret intentions, the known principles, or even the express parol declarations of the writer, except⁶ where the

¹ *R. v. Wick St. Lawrence*, 1833, 5 B. & Ad. 535; *R. v. Wheelock*, 1826, 5 B. & C. 511; *R. v. Peranzabuloe*, 1844, 13 L. J. M. C. 47; *R. v. Flintshire*, 1844, 3 Dowl. & L. 537.

² *R. v. Wick St. Lawrence*, 1833, 5 B. & Ad. 535; *R. v. Yeeveley*, 1838, 8 A. & E. 818.

³ *Newenham v. Smith*, 1859, 10 Ir. C. L. R. 245.

⁴ *Doe v. Gwillim*, 1833, 5 B. & Ad. 129; *Doe v. Martin*, 1833, 4 B. & Ad.

771, 785; *Shore v. Wilson*, 1842, 9 Cl. & Fin. 355, 525 (Coleridge, J., Parke, B., Tindal, C.J.) (H. L.); *Beaumont v. Field*, 1818, 2 Chitty, R. 275; *Richardson v. Watson*, 1833, 4 B. & Ad. 800; *Rickman v. Carstairs*, 1833, 5 B. & Ad. 662.

⁵ See Leiber's *Legal and Polit. Hermeneutics*, c. 1, § 8, and c. 3, §§ 2, 3; *Doct. & Stu.* 39, c. 24.

⁶ As to these exceptions, see further, post, §§ 1206, 1227.

**§§ 1202,
1203.**

description in the document would equally apply to any one of two or more subjects,¹ or where the object is to rebut an equity.² In all cases alike, the court must expound the instrument in strict accordance with the language employed; and if the primary meaning of this language be unambiguous, both with reference to the context, and to the circumstances in which the parties to the instrument were placed at the time of making it, such primary meaning must be taken conclusively to be that in which the parties used the language, and no extrinsic evidence can be received to show that in fact they used it in any other sense, or had any other intention.³

§ 1203. For instance,⁴ parol evidence to show what persons a testator meant to include or exclude in employing the words "relations," has repeatedly been rejected;⁵ neither can it be received to show what articles he intended to give by the word "plate,"⁶ or what property he thought he devised by the expression "lands out of settlement,"⁷ and the like.⁸ In all these cases, as the legal signification of the language used was plain, it matters not what the testator intended; the sole question being, *non quod voluit, sed quod dixit*.⁹ If this were otherwise, no lawyer would be safe in advising upon the construction of a written instrument, nor any party in taking under it; for the ablest advice might be controlled, and the clearest title undermined, if, at some future period, parol evidence of a particular

¹ *Shore v. Wilson*, 1842, 9 Cl. & Fin. 355 (Parke, B.) (H. L.).

² See post, §§ 1227—1230.

³ *Shore v. Wilson*, 1842, 9 Cl. & Fin. 355, 525 (Coleridge, J., Parke, B., Tindal, C.J.) (H. L.). *Re Peel*, 1870, L. R. 2 P. & D. 46, appears to unprofessional men a reduction of this rule to an absurdity.

⁴ For other instances, see ante, §§ 1155, 1156.

⁵ *Goodinge v. Goodinge*, 1749, 1 Ves. Sen. 230; *Edge v. Salisbury*, 1749, Amb. 70; *Green v. Howard*, 1779, 1 Bro. C. C. 31. See *Sullivan v. Sullivan*, 1870, Ir. R. 4 Eq. 457, where the words were "my dearly beloved."

⁶ *Nicholls v. Osborn*, 1727, 2 P. Wms. 419; *Kelly v. Powlet*, 1763,

Amb. 605.

⁷ *Strode v. Russel*, 1708, 2 Vern. 621.

⁸ See other instances collected in *Wigr. Wills*, 99—105. See, also, *Doe v. Hubbard*, 1850, 20 L. J. Q. B. 61; *Horwood v. Griffith*, 1854, 23 L. J. Ch. 465; *Hicks v. Sallitt*, 1854, 23 L. J. Ch. 571; *Millard v. Bailey*, 1866, L. R. 1 Eq. 378. In *Knight v. Knight*, 1861, 30 L. J. Ch. 644, *Stuart, V.-C.*, appears to have utterly ignored this rule, holding that extrinsic evidence was admissible to show that, under the words "ready money," a testator meant that shares in an insurance company should pass. See *qu.*

⁹ *Shore v. Wilson*, 1842, 9 Cl. & Fin. 355, 558 (Parke, B.) (H. L.).

meaning which the party affixed to his words, or of his secret intention in making the instrument, or of the objects he meant to benefit under it, might be set up to contradict or vary its plain language.¹

§§ 1203—
1204.

§ 1203A. Declarations of intention may, however, be received in evidence when the question does not turn on the *meaning* of the language employed; consequently, if a will be lost, evidence of the testator's declarations of intention will be admissible in proof of its contents;² and if a question arise with regard to the constituent parts of an existing will, similar statements, whether oral or written, and whether made before or after it was signed, may be given in evidence to show what was or was not a part of the instrument at the time of its execution.³

§ 1204. The general rule has, moreover, been somewhat relaxed in order to facilitate the interpretation of *ancient* writings. For if an instrument be old, and its meaning doubtful, the *acts* of the author (which are only modes of expressing intention more weighty than words) may be given in evidence in aid of its construction. Tindal, L.C.J., once expressly declared, that to ascertain the sense of an old charity grant, evidence of "the early and contemporaneous application of the funds of the charity itself by the original trustees under the deed," is certainly admissible.⁴ Proof of the application of the funds of an ancient charity by the original founder, and first trustee, is, indeed, strong evidence of intention, and may be so regarded by the court in construing an old grant;⁵ and, while evidence of the declarations of the founder of an ancient charity, either against, or in favour of, his grant, cannot be received, evidence may be given of *acts* of the founder in relation to the charity.⁶ Lord St. Leonards, too, once observed, "Tell me what you have done under such a deed, and I will tell you what that deed means."⁷

¹ Id. (Tindal, C.J.).

² Sugden v. Ld. St. Leonards, 1876, 1 P. D. 154.

³ Gould v. Lakes, 1880, 6 P. D. 1; Re Ball, 1890, 25 L. R. Ir. 556; Sugden v. Ld. St. Leonards, 1876, 1 P. D. 154.

⁴ Shore v. Wilson, 1842, 9 Cl. & Fin. 355, 569 (H. L.). See, also, Att.-Gen. v. Sidney Sussex Coll. 1869, L. R. 4 Ch. 722, 732 (C. A.);

Att.-Gen. v. May. of Bristol, 1820, 2 Jac. & W. 294. See 7 & 8 V. c. 45 ("The Nonconformist Chapels Act, 1844"), § 2, cited ante, § 75.

⁵ Att.-Gen. v. Brazenose College, 1834, 1 L. J. Ch. 66 (H. L.).

⁶ Drummond v. Att.-Gen., 1848, 2 H. L. C. 837.

⁷ Att.-Gen. v. Drummond, 1842, 1 Dr. & War. 353 (Ir.).

§ 1205.

§ 1205. Charities, however, possess no peculiarity which warrants the adoption of a special rule of evidence with respect to them. Consequently, *all* ancient instruments of every description may, *when they contain ambiguous language*, but in that event only, be interpreted by what is called contemporaneous and continuous usage under them, or, in other words, by evidence of the mode in which property dealt with by them has been held and enjoyed.¹ For instance, the contemporaneous acts of occupiers of land have been admitted in evidence to explain the meaning of an ambiguous award under an old enclosure Act;² evidence that the tenants had for a long series of years enjoyed the land itself has been received on a question as to whether the soil, or merely the herbage, passed under the term "pastura" contained in an ancient admission as entered on the court-rolls of a manor;³ the by-laws of a corporation may be taken as an exposition of their charter;⁴ and evidence of contemporaneous, or even of constant modern,⁵ usage will be admissible, for the purpose of ascertaining the meaning and effect of an ancient grant or charter from the Crown,⁶ or of any private deed, or other instrument, of remote antiquity.⁷ Even when an old

¹ *Weld v. Hornby*, 1806, 7 East, 199; *Waterpark v. Fennell*, 1859, 7 H. L. C. 650; *Donegall v. Templemore*, 1858, 9 Ir. C. L. R. 374; *D. of Devonshire v. Neill*, 1877, 2 L. R. Ir. 132, 146 (Palles, C.B.); *Att.-Gen. v. Parker*, 1747, 3 Atk. 577 (Id. Hardwicke); *R. v. Dulwich College*, 1851, 21 L. J. Q. B. 36; *Att.-Gen. v. Murdoch*, 1852, 21 L. J. Ch. 694. In *Att.-Gen. v. St. Cross Hospital*, 1853, 22 L. J. Ch. 793, Sir J. Romilly, M.R., held that no presumption could be made against the clear ostensible purpose of the foundation, though it were supported by a usage of 150 years. See *Att.-Gen. v. Clapham*, 1854, 24 L. J. Ch. 177.

² *Wadley v. Baylis*, 1814, 5 Taunt. 752; recognised (Cresswell, J.) in *Doe v. Bevis*, 1849, 18 L. J. C. P. 128; *Att.-Gen. v. Boston*, 1847, 1 De G. & Sm. 519.

³ *Doe v. Bevis*, 1849, 18 L. J. C. P. 128; *Stammers v. Dixon*, 1806, 7 East, 200.

⁴ *Davis v. Waddington*, 1844, 14 L. J. C. P. 45.

⁵ *Chad v. Tilsed*, 1821, 2 B. & B. 403; *Doe v. Bevis*, 1849, 18 L. J. C. P. 128; *D. of Beaufort v. May. of Swansea*, 1849, 3 Ex. 413; *Master Pilots, &c. of Newcastle v. Bradley*, 1851, 23 L. J. Q. B. 35; *Shephard v. Payne*, 1863, 33 L. J. C. P. 158 (C. A.).

⁶ *May. of London v. Long*, 1807, 1 Camp. 22; *R. v. Varlo*, 1775, 1 Cowp. 248; *Blankley v. Winstanley*, 1789, 3 T. R. 279; *Bradley v. Pilots of Newcastle*, 1853, 23 L. J. Q. B. 35; *Jenkins v. Harvey*, 1835, 1 C. M. & R. 877; 2 C. M. & R. 393; *Brune v. Thompson*, 1843, 11 L. J. Q. B. 131.

⁷ *Withnell v. Gartham*, 1795, 6 T. R. 397; *Weld v. Hornby*, 1806, 7 East, 199; *Duke of Beaufort v. May. of Swansea*, 1849, 3 Ex. 413; *Sadlier v. Biggs*, 1853, 4 H. L. C. 435; *Waterpark v. Fennell*, 1859, 7 H. L. C. 650.

statute is ambiguous, the maxim, *optimus interpres rerum usus*, §§ 1205—1208. will apply.¹

1206. As before mentioned,² moreover, the *declarations* of the writer of an instrument will be *receivable in evidence* in two cases. One of these arises *where extrinsic evidence has shown that a description in the instrument is alike applicable, with legal certainty, o two or more persons or things.*

1207. To use the words of Lord Abinger, “there is *but one case*,³ in which . . . this sort of evidence of intention can properly be admitted, and that is, where the meaning of the testator’s words is neither ambiguous nor obscure, and where the devise is on the face of it perfect and intelligible, but, from some of the circumstances admitted in proof, an ambiguity arises, as to which of the two or more things,⁴ or which of the two or more persons (each answering the words in the will), the testator intended to express. Thus, if a testator devise his manor of S. to A. B., and has two manors of North S. and South S., it being clear he means to devise one only, whereas both are equally denoted by the words he has used, in that case there is what Lord Bacon calls ‘an equivocation,’ that is, the words equally apply to either manor, and evidence of previous intention may be received to solve this latent ambiguity,⁵ for the intention shows what he meant to do; and when you know that, you immediately perceive that he has done it by the general words he has used, which, in their ordinary sense, may properly bear that construction. It appears to us, that, in all other cases, parol evidence of what was the testator’s intention ought to be excluded, upon this plain ground, that his will ought to be made in writing; and if his intention cannot be made to appear by the writing, explained by circumstances, there is no will.”⁶

§ 1208. The rule thus laid down has been followed in various

¹ *R. v. Scott*, 1790, 3 T. R. 604; *Sheppard v. Gosnold*, 1673, Vaugh. 169; *R. v. Abp. of Canterbury*, 1848, 18 Q. B. 581 (Coleridge and Patteson, JJ.); *Montrose Peer.*, 1853, 1 Macq. 401 (H. L.).

² *Ante*, § 1202. See, also, *Charter v. Charter*, 1874, L. R. 2 P. D. 315 (H. L.).

³ As to rebutting an equity, see, however, §§ 1227—1230.

⁴ See *Harmen v. Gurner*, 1866, 35 Beav. 748.

⁵ See *Douglas v. Fellows*, 1853, 23 L. J. Ch. 167.

⁶ *Doe v. Hiscocks*, 1839, 9 L. J. Ex. 27.

§ 1208. cases. Thus, on the one hand, where there is a devise to a relative described as being of a certain degree of relationship, it *prima facie* means legitimate relationship; and if there exist a legitimate relation of this degree, parol evidence is not admissible to show that an *illegitimate* relation whose reputed relationship is of the same degree, was the person really intended.¹ If, however, no legitimate relation of the class mentioned exists or could have been referred to by the will, or if the terms of the will could never have full effect if confined to legitimate relations and ambiguity arises, evidence is admissible to prove that illegitimate relations of the same degree are meant.² Further, on a gift by will to "my niece, E. W." if neither the testator nor his wife possess a niece, though it may be shown that a niece or grandniece of the wife was meant—and such a person can claim the gift as a "niece"³—extrinsic evidence is not admissible to show that another but illegitimate grandniece was meant.⁴ Again, on a gift to the "children" of a donee who has two families, all his children will take, and extrinsic evidence cannot be received to show that only the children of one family were meant, for the word "children" is not ambiguous.⁵ On the other hand, where a testator devised one house "to George Gord, the son of George Gord," another "to George Gord, the son of John Gord," and a third after the expiration of certain life estates, "to George Gord, the son of Gord," evidence of his declarations was admitted to show, that the person meant to be designated by the last description was George the son of *George* Gord;⁶ where a devise is expressed to be in favour of a person who is named and described, but there are two persons, each of whom possesses the name and description, parol evidence of the testator's

¹ See *Dorin v. Dorin*, 1875, L. R. 7 H. L. 568; *In re Taylor*, 1887, 34 Ch. D. 255; *Wells v. Wells*, 1874, L. R. 18 Eq. 504; *In re Brown*, 1889, 61 L. T. 463.

² *In re Du Bochet*, [1901] 2 Ch. 441 (Joyce, J.); and see *Hill v. Crook*, 1873, L. R. 6 H. L. 265. The cases as to when an illegitimate relation can take under such a demise are somewhat difficult to reconcile, see them collected and

commented on in *Gorman on Wills*, 5th ed., c. xxxi.

³ *In re Fish*, *Ingham v. Rayner*, [1894] 2 Ch. 83.

⁴ *Sherratt v. Montford*, 1873, L. R. 8 Ch. 298.

⁵ *Andrews v. Andrews*, 1884–85, 15 L. R. Ir. 199, 211; *Dorin v. Dorin*, 1875, *supra*.

⁶ *Doe v. Needs*, 1836, 6 L. J. Ex. 59; *Doe v. Morgan*, 1832, 1 C. & M. 235.

intention or declarations is admissible to resolve this latent §§ 1208—
ambiguity.¹ 1210.

§ 1209. Where declarations of intention are receivable in evidence, their admissibility appears not to depend upon the *time* when they were made. Certainly, *contemporaneous* declarations will, *cæteris paribus*, be entitled to greater weight than those made before or after the execution; but in point of law no distinction can be drawn between them,² unless the subsequent declarations, instead of relating to what the declarant had done, or had intended to do, by an instrument, were simply to refer to what he intended to do, or wished to be done, at the time of speaking.³ Neither will the *admissibility* of declarations rest on the manner in which they were made, or on the occasions which called them forth. Whether they consist of statements gravely made to interested parties, or of instructions to professional men, or of light conversations, or of angry answers to impertinent inquiries by strangers, they will be alike received in evidence, though the *credit* due to them will of course vary materially according to the time and circumstances.⁴ They may of course consist of letters; for example, letters in which a deceased insured expressed an intention of going to a certain place where a dead body, the identity of which is questioned, has been found.⁵

§ 1210. Moreover, though declarations of intention are inadmissible, except for the purpose of explaining a latent ambiguity in the instrument, mere *collateral statements* made by the author of the instrument respecting the persons or things mentioned therein are not excluded. For instance, where a testator has habitually called certain persons or things by *peculiar names*, by which they were not commonly known, these names occurring

¹ *Doe v. Allen*, 1840, 12 A. & E. 451; *Fleming v. Fleming*, 1862, 31 L. J. Ex. 419; *Jones v. Newman*, 1750-51, 1 W. Bl. 60; explained in *Doe v. Hiscocks*, 1839, 9 L. J. Ex. 27; *Phelan v. Slattery*, 1887, 19 L. R. Ir. 177; *Bennett v. Marshall*, 1856, 2 K. & J. 740; *Re O'Reilly*, 1874, 43 L. J. P. & M. 5. See *Webber v. Corbett*, 1874, L. R. 16 Eq. 515.

² *Doe v. Allen*, 1840, 12 A. & E.

451 (Ld. Denman), as to *subsequent* declarations; *Doe v. Hiscocks*, 1839, 9 L. J. Ex. 27, as to *previous* declarations. See, *contra*, *Thomas v. Thomas*, 1796, 6 T. R. 671; *Strode v. Russell*, 1708, 2 Vern. 621.

³ *Whitaker v. Tatham*, 1831, 7 Bing. 628.

⁴ *Trimmer v. Bayne*, 1802, 7 Ves. 518.

⁵ *Mutual Life, &c. v. Hillman*, 1892, 145 N. S. 285 (Am.).

§§ 1210,
1211.

in his will, could only be explained and construed by the aid of evidence to show the sense in which he used them, in like manner as if his will were written in cipher, or in a foreign language,¹ and the habits of the testator in these particulars must be receivable as evidence to explain the meaning of his will.² Accordingly, under a devise in trust for "the second son of *Edmond Weld*, of *Lulworth*, Esq.," parol evidence was admitted to show that the testator had on several occasions, even after correction, called the possessor of *Lulworth* "*Edmond*,"³ though his real name was "*Joseph*."

§ 1211. Again,⁴ where a testatrix of great age bequeathed "to *Mrs. and Miss Bowden*, of *Hammersmith*, widow and daughter of the late *Rev. Mr. Bowden*, 200*l.* each," evidence was received (and acted upon) that no "*Mrs. Bowden*" answering the description in the bequest, had for years lived at *Hammersmith*; that the testatrix had, years before, been intimately acquainted with *Bowdens*; that a certain *Mrs. Washbourne* was the daughter of a *Rev. Mr. Bowden*; and that testatrix had been in the habit of calling her by her maiden name of *Bowden*, and often, after being reminded of the mistake, acknowledged that she had confounded the two names. Similarly, under a bequest to "*Mrs. G.*" parol evidence was admitted to show that the testator had been in the habit of calling a *Mrs. Gregg*, "*Mrs. G.*;"⁵ while (and perhaps this case⁶ carries this doctrine to its extreme limit) under a gift of a legacy to *Catherine Earnley*, proof was received (and acted upon) that no such person as *Catherine Earnley* was known, and that the testator usually called one *Gertrude Yardley* "*Gatty*," which might easily have been mistaken by the scrivener who drew the will for "*Katy*."

¹ As to which, see *supra*, § 1196.

² *Doe v. Hiscocks*, 1839, 9 L. J. Ex. 27. See, also, *Doe v. Hubbard*, 1850, 20 L. J. Q. B. 61.

³ *Ld. Camoys v. Blundell*, 1848, 1 H. L. C. 786. See, also, *Mostyn v. Mostyn*, 1854, 23 L. J. Ch. 925 (H. L.).

⁴ *Lee v. Pain*, 1844, 14 L. J. Ch. 346. See, also, *R. v. Wooldale*, 1845, 14 L. J. M. C. 13.

⁵ *Abbott v. Massie*, 1796, 3 Ves. 148; explained (*Rolfe, B.*) in *Clayton*

v. Ld. Nugent, 1844, 13 M. & W. 205. See, also, *In the goods of François de Rosaz*, 1877, 2 P. D. 66.

⁶ *Beaumont v. Fell*, 1723, 2 P. Wms. 141. Declarations of the testator were here admitted, but the propriety of receiving such evidence has been strongly questioned (*Ld. Abinger*) in *Doe v. Hiscocks*, 1839, 9 L. J. Ex. 27, and, as an authority of that, the case may be considered overruled.

§ 1211A. So also, where no one answers to the description of a legatee given by a testator in his will, former wills made by him are admissible in evidence to show his knowledge and state of mind at the time, and so to identify the intended legatee. Thus, where a testator gave legacies to "such of the daughters of my late friend Ignatius Scoles, deceased, as shall be living and unmarried at my decease," and it appeared that Ignatius Scoles was living at the date of the will and had never been married, and was, to the testator's knowledge, a Jesuit priest, and therefore could not marry, but that his father, J. J. Scoles (who the testator might have known was dead at the date of the will), had left several daughters intimately known to the testator, a former will of the testator, by which he left legacies to the daughters of J. J. Scoles by name, describing them as the daughters of the late Mr. Scoles, was admitted in evidence to prove that they were the intended legatees.¹ So also, where a testator misdescribed certain railway stock held by him, evidence of former wills made by him was admitted to explain what stock he intended by his will.²

§§ 1211a,
1212.

§ 1212. This rule, by which the admissibility of declarations of intention is governed, largely turns upon the distinction between a *patent* and a *latent* ambiguity, and will be better understood by reference to cases where evidence of such declarations has been rejected. Says Lord Bacon, "There be two sorts of ambiguities of words, the one is *ambiguitas patens*, and the other *latens*. *Patens* is that which appears to be ambiguous upon the deed or instrument; *latens* is that which seemeth certain and without ambiguity, for anything that appeareth upon the deed or instrument; but there is some collateral matter out of the deed that breedeth the ambiguity. *Ambiguitas patens* is never holpen by averment; and the reason is, because the law will not couple and mingle matter of specialty, which is of the higher account, with matter of averment, which is of inferior account in law, for that were to make all deeds hollow and subject to averments, and so, in effect, that to pass without deed, which the law appointeth shall not pass but by deed.

¹ In re Waller, 1899, 68 L. J. Ch. 526 (C. A.).

² In re Smith, 1904, 20 T. L. R. 287 (Byrne, J.).

§§ 1212—
1214.

Therefore, if a man give land to J. D. and J. S. et hæredibus, and do not limit to whether of their heirs, it shall not be supplied by averment to whether of them the intention was (that) the inheritance should be limited." "But if it be ambiguitas latens, then otherwise it is; as if I grant my manor of S. to J. F., and his heirs, here appeareth no ambiguity at all. But if the truth be, that I have the manors both of South S. and North S., this ambiguity is matter in fact; and therefore it shall be holpen by averment, whether of them it was, that the party intended should pass."¹ He also remarked; "Ambiguitas verborum latens, verificatione suppletur; nam quod ex facto oritur ambiguum verificatione facti tollitur."²

§ 1213. So far as patent ambiguities are concerned, Lord Bacon's exposition of the law is sufficiently precise; and there can be no doubt that when the ambiguity is *patent*, all declarations of the writer's intention will be uniformly excluded. For example, if a testator, after leaving specific legacies to his several children, were to bequeath the residue to his child, not specifying which, the will would, so far as regarded the residuary bequest, be inoperative and void; and on the same principle, where a testator purported to leave his property to persons designated by letters of the alphabet, his will stating at its end that the key to the initials was in his writing-desk on a card, it was held that (no card of as old a date as the will being found) a card which would have furnished a key, but was dated many years after the execution of the will, could only be regarded as a declaration of the testator, and that the case being one of patent ambiguity, the species of evidence could not be legally admitted.³

§ 1214. The law as to latent ambiguities is not so easily intelligible. To begin with, it must not be supposed that, because no ambiguity arises on the face of the instrument, *any* doubt which is occasioned by extrinsic evidence may be cleared up by having recourse to the declarations of the writer's intention. In many instances of strictly *latent* ambiguities evidence of declarations of intention would be inadmissible. Thus, a will

¹ See Bacon's Law Tracts, 99, 100.

² Bacon's Maxims, Reg. 23.

³ Clayton v. I.d. Nugent, 1844, 13 M. & W. 205. See Kell v. Charmer,

1856, 23 Beav. 195, cited ante, § 1196; and see, also, Whateley v. Spooner, 1857, 3 K. & J. 542, cited ante, § 1195.

apparently plain and intelligible, may, when an inquiry is instituted respecting the persons or things to which it relates, turn out to be "*uncertain*;" that is, not to describe persons or things to which it refers with *legal certainty*. For example suppose a bequest to the *four* children of A., and it appears that A. had *six* children, two by a first marriage, and the remainder by a second. Evidence of the circumstances of the family, and of the respective ages of the children, would no doubt be admissible, with the view of identifying the particular legatees alluded to in the will, but proof of the testator's declarations of intention could not be received, so that the gift would be bad for uncertainty.¹

§§ 1214
1215.

§ 1215. In the second place, a legatee may be so described in a will, that *while part of the description answers to one claimant, the remainder may apply to another*. Formerly the law attached some greater weight to the *name* than to the *description* of the legatee, so that if there were nothing in the rest of the will, or in admissible evidence, to show who was meant, the person rightly named was allowed to take in preference to him who was only rightly described.² This doctrine seems to have been first promulgated by Lord Bacon,³ who embodied it in the maxim, "*Veritas nominis tollit errorem demonstrationis*." Thus, where a man had, in the lifetime of his wife, Mary, gone through the marriage ceremony with a reputed second wife, Caroline, with whom he had continued to reside up to the date of his decease, and by a will made shortly before his death devised certain property to "*his dear wife Caroline*," on the question whether the will designated the lawful wife who was wrongly, or the unlawful wife who was rightly, named, the Court held Caroline to be entitled.⁴ The doctrine has however been very roughly handled by Lord Chancellor Campbell in the House of Lords;⁵

¹ Doe v. Hiscocks, 1839, 9 L. J. Ex. 27 (Ld. Abinger), questioning Hampshire v. Peirce, 1750, 2 Ves. Sen. 216; Andrews v. Andrews, 1884-85, 15 L. R. Ir. 199, 211 (Ir.), supra, § 1208.

² Ld. Camoys v. Blundell, 1848, 1 H. L. C. 786 (Parke, B., pronouncing the opinion of the judges). But see Drake v. Drake, 1860, 8 H. L. C. 172; and Farrer v. St. Catherine's

Coll., 1873, L. R. 16 Eq. 21 (Ld. Selborne, C.).

³ Ld. Camoys v. Blundell, 1848, 1 H. L. C. 786 (Ld. Brougham).

⁴ Doe v. Rouse, 1848, 17 L. J. C. P. 108; Adams v. Jones, 1852, 21 L. J. Ch. 352; Dilley v. Matthews, 1863, 11 W. R. 614.

⁵ Drake v. Drake, 1860, 8 H. L. C. 172, 179.

§§ 1215,
1216.

and if it cannot at present be safely regarded as exploded,¹ still less, on the other hand, can it be recognised as an inflexible rule.² In all such cases the context and the surrounding facts will be looked at closely, and the Court will place itself, as nearly as may be, in the situation of the testator at the time of executing the instrument. If it can then *clearly* ascertain from the language of the will³ which of two claimants was intended by the testator, it will award the legacy to the one so meant to be benefited,⁴ though the supposed maxim may chance to be contravened.⁵

§ 1216. A striking illustration of this last principle is afforded by a case⁶ where a testator devised an estate to his nephew for life, with remainder over to "*Elizabeth Abbott a natural daughter of Elizabeth Abbott, of Gillingham, single woman, who had formerly lived in his service,*" and it appeared that, at the date of the will, Elizabeth Abbott, the mother, was the wife of John Caddy, and had had only two children, namely, a *natural son* named John, born before his mother's marriage, shortly after she had left the testator's service, and of whom testator's nephew was the putative father, the other named Margaret, who was born four years subsequently to her leaving the service, and was a *legitimate daughter* by Caddy, and it further appeared that the testator had wished his nephew to marry his servant, that he was aware she had had a natural child, and that he had treated her kindly since its birth and up to the date of the will; but no proof was given that he knew whether the natural child was a boy or a

¹ See *In re Plunkett's Estate*, 1861, 11 Ir. Ch. R. 361; *Colclough v. Smyth*, 1860, 15 Ir. Ch. R. 347; *Garner v. Garner*, 1860, 29 Beav. 116; *Gillett v. Gane*, 1870, L. R. 10 Eq. 29.

² *Ld. Camoys v. Blundell*, 1848, 1 H. L. C. 786; *Thomson v. Hempenstall*, 1849, 1 Roberts. 783.

³ *Re Drake*, 1881, 6 P. D. 217.

⁴ *Garland v. Beverley*, 1878, 9 Ch. D. 213; *In re Lyon's Trusts*, 1879, 48 L. J. Ch. 245.

⁵ *Doe v. Huthwaite*, 1820, 2 M. & Rob. 48; explained (*Ld. Abinger*) in *Doe v. Hiscocks*, 1839, 9 L. J. Ex. 27; *Ld. Camoys v. Blundell*, 1848, 1 H. L. C. 786; *Healy v. Healy*, 1875, Ir. R. 9 Eq. 418; *Charter v. Charter*, 1874, L. R. 2 P. & D. 315 (H. L.); *In re Wolverton Mort-*

gaged Estates, 1877, 7 Ch. D. 197; *In re Nunn's Will*, 1875, L. R. 19 Eq. 331; *In re Blayney's Trusts*, 1875, Ir. R. 9 Eq. 413, where the doctrine was carried to its limit (*Sullivan, M.R.*); *Bernasconi v. Atkinson*, 1853, 23 L. J. Ch. 184; *In re Bridget Feltham*, 1855, 1 K. & J. 528; *Hodgson v. Clarke*, 1860, 1 De G. F. & J. 394; *Re Gregory's Settlement and Wills*, 1865, 34 Beav. 600; *Re Noble's Trusts*, 1871, Ir. R. 5 Eq. 140; *Re Feltham's Trusts*, 1855, 1 K. & J. 528; *Re Kilvert's Trusts*, 1871, L. R. 7 Ch. 170; *Dooley v. Mahon*, 1877, Ir. R. 11 Eq. 229.

⁶ *Ryall v. Hannam*, 1847, 16 L. J. Ch. 491. See, also, *Douglas v. Fellows*, 1853, 23 L. J. Ch. 167.

girl. It was held that the testator meant to provide for his nephew's natural child by his servant, Elizabeth Abbott, and that the mistake of the name and sex was not sufficient to defeat the devise.

§§ 1216,
1217.

§ 1217. In cases of this nature, however, the Court cannot, it must be recollected, receive any *declarations* of the testator as to what he intended to do¹ by his will. Thus, in a leading case, a testator devised lands to his son, John Hiscocks, for life; and after his decease, to his grandson, "*John, the eldest son of the said John Hiscocks,*" it appearing that the testator's son had been twice married, and that by his first wife he had a son named Simon, but that John was the eldest son of the second marriage; it was held, that evidence of the instructions given by the testator for his will, and of his declarations, was not admissible for the purpose of showing which of these two grandsons was intended.² So, again, in the case cited below, upon the question whether a great-great-niece could take under the description of a "niece," evidence was offered that the testator had had a niece named Elizabeth Stringer, to whom by a former will he had left a legacy; that this niece (who was grandmother to Elizabeth Stringer, the claimant) died in 1848; that, in 1850, the testator made a codicil, without allusion to the lapsed legacy; that in 1852 he instructed his solicitor to prepare a second (and inconsistent) codicil, on which occasion he again made no reference to Elizabeth Stringer's legacy; that his solicitor, having recommended that, in lieu of two inconsistent codicils, a new will should be made, and being ignorant of the death of Elizabeth Stringer, the niece, copied into the second will the bequest in her favour as it stood in the first will; and that the testator's memory was impaired by age, and his attention was not in any way directed to the legacy in question, which, beyond reasonable doubt, having thus been inserted by the solicitor through ignorance, was allowed to remain by the testator through forgetfulness. Assuming this evidence to be admissible, the claimant was

¹ *Doe v. Hiscocks*, 1839, 9 L. J. Ex. 27, where *Ld. Abinger* questions and overrules the contrary dicta of *Ld. Kenyon* and *Lawrence, J.*, in *Thomas v. Thomas*, 1796, 6 T. R. 671.

² See, also, *Drake v. Drake*, 1860, 8 H. L. C. 172; *Douglas v. Fellows*, 1853, 23 L. J. Ch. 167; *Bernasconi v. Atkinson*, 1853, 23 L. J. Ch. 184; *Farrer v. St. Catherine's Coll.*, 1873, L. R. 16 Eq. 21 (*Ld. Selborne, C.*).

**§§ 1217—
1220.**

clearly not the object of the testator's bounty. Such evidence, however, was rejected, first, by the Master of the Rolls,¹ and next, by the full Court of Appeal,² as not being admissible to guide the Court in the construction of the will, and Elizabeth Stringer, the claimant, was consequently held entitled to the property although she was a great-great-niece, not a "niece," and although her proper name was not "Elizabeth Stringer" but Elizabeth Jane Stringer.

§§ 1218-19. In the third place,³ the description may *not accurately specify* even one person or thing; that is, the description of the subject intended may be true in part, but not true in every particular. Here, though parol evidence of the author's declarations cannot be received, the instrument will not in consequence of the inaccuracy be regarded as inoperative. If after rejecting so much of the description as is false, the remainder will enable the Court to ascertain with legal certainty the subject-matter to which the instrument really applies, it will be allowed to take effect.⁴ The rule of the civil law, "*Falsa demonstratio non nocet cum de corpore constat*," is followed in such cases.

§ 1220. The rule, which rejects erroneous descriptions, which are not substantially important, can, however, only be applied where enough remains to show the intent plainly. It is⁵ "clearly settled, that when there is a sufficient description set forth of premises, by giving the particular name of a close, or otherwise, we may reject a false demonstration; but that if the premises be described in general terms, and a particular description be added, the latter controls the former." It matters not which part of the description is placed first, and which last, in the sentence; since "it is vain to imagine one part before another; for though words can neither be spoken nor written at once, yet the mind of the author comprehends them at once, which gives *vitam et modum* to the sentence."⁶

¹ Stringer v. Gardiner, 1859, 28 L. J. Ch. 758.

² Stringer v. Gardiner, 1860, 28 L. J. Ch. 758.

³ For the two first cases, see *supra*, §§ 1214, 1215 et seq.

⁴ See Ford v. Batley, 1854, 23 L. J. Ch. 225; Coltman v. Gregory, 1871,

40 L. J. Ch. 352.

⁵ Doe v. Galloway, 1833, 5 B. & Ad. 43 (Parke, J.). See, also, Doe v. Hubbard, 1850, 20 L. J. Q. B. 61; Doe v. Carpenter, 1850, 20 L. J. Q. B. 70.

⁶ Stukeley v. Butler, 1615, Hob. 171.

§ 1221.¹ Examples of the rule "*falsa demonstratio non nocet*," are furnished by its having been held that, under a lease of "all that part of Blenheim park, situate in the county of Oxford, and now in the occupation of one S., lying" within certain specified abutments, "with all the houses thereto belonging, and which are now in the occupation of the said S.," a house lying within the abutments, though not in the occupation of S., would pass;² that by a devise of "all that my farm called Trogue's farm, now in the occupation of C.," the whole farm passed, though it was not all in C.'s occupation;³ that a devise of all the testator's *freehold* houses in Aldersgate-street, when in fact he had only leasehold houses there, was, in substance and effect, a devise of his houses in that street, the word freehold being rejected as surplusage;⁴ that if a landlord, having but one house in a street describe it in a lease by a wrong number, and then let a tenant into possession under it, he cannot afterwards rely on the error, and contend that no interest passed; for the number is rejected as an immaterial part of the description;⁵ that where land was described in a patent as lying in the county of M., and further described by reference to natural monuments, on its appearing that the land described by the monuments was in the county of H., and not of M., that part of the description which related to the county must be rejected, since, said the Court, the entire description in the patent being taken, and the identity of the land ascertained, by a reasonable construction of the language used, and a repugnant description, which, by the other descriptions in the patent, clearly appeared to have been made through

§ 1221.

¹ Gr. Ev. § 301, in part.

² Doe v. Galloway, 1833, 5 B. & Ad. 43; Dyne v. Nutley, 1853, 14 C. B. 122.

³ Goodtitle v. Southern, 1813, 1 M. & Selw. 299; recognised in Miller v. Travers, 1832, 8 Bing. 253; and in Slingsby v. Grainger, 1859, 7 H. L. C. 282 (Ld. Cranworth). See also Hardwick v. Hardwick, 1873, L. R. 16 Eq. 168 (Ld. Selborne, C.); Barber v. Wood, 1877, 4 Ch. D. 885; Norreys v. Franks, 1874, Ir. R. 9 Eq. 18; Keogh v. Keogh, 1874, Ir. R. 8 Eq. 179, 449; Harrison v.

Hyde, 1859, 22 L. J. Ex. 119; Stanley v. Stanley, 1862, 2 J. & H. 491; West v. Lawday, 1865, 11 H. L. C. 375; White v. Birch, 1867, 36 L. J. Ch. 174; In re Whatman, 1865, 34 L. J. P. & M. 17; Travers v. Blundell, 1877, 6 Ch. D. 436 (C. A.)

⁴ Day v. Trig, 1715, 1 P. Wms. 286, cited with approbation (Tindal, C.J.) in Miller v. Travers, 1832, 8 Bing. 253; Doe v. Cranstoun, 1840, 7 M. & W. 1, 10.

⁵ Hutchins v. Scott, 1837, 6 L. J. Ex. 186. See Hitchin v. Groom, 1848, 2 M. & W. 816.

**§§ 1221,
1222.**

mistake, not making the patent void. If, however, land granted be so inaccurately described as to render its identity wholly uncertain, the grant is void.¹ But where lands are described by the number or name of the lot or parcel, and also by metes and bounds, and the grantor owns lands answering to the one description, and not to the other, the description of the lands, owned by him, will be taken to be the true one, and the other will be rejected as *falsa demonstratio*.²

§ 1222. Two cases³ may be cited in which the rule which rejects erroneous description, and admits parol evidence for the purpose of showing how the mistake arose, was carried to its extreme bounds. In each a testator had devised to certain legatees a sum which he described as part of a specified stock, of which at the date of the will, and thence up to the time of his death, he had none, though he had had some such stock some years before, and had sold it out, and invested the produce in other securities of somewhat similar name. Proof of these facts was admitted, not, indeed, "to prove that there was a mistake, for that was clear, but to show how it arose;" and (as pointed out in the later case) not, as it has been erroneously supposed,⁴ for the purpose of showing that the testator, when he used the erroneous description of the first stock, meant to bequeath the second stock, but simply for the purpose of rendering legacies, which were *prima facie* specific, payable out of the general personal estate.⁵ In other words, a good legacy is not adeemed by being made payable out of a fund which is not the subject of the will.

¹ *Boardman v. Reed and Ford's Lessees*, 1832, 6 Pet. 328, 345 (Am.).

² *Loomis v. Jackson*, 1822, 19 Johns. 449 (Am.); *Lush v. Druse*, 1830, 4 Wend. 313 (Am.); *Jackson v. Marsh*, 1826, 6 Cowen, 281 (Am.); *Worthington v. Hylyer*, 1808, 4 Mass. 196 (Am.); *Blague v. Gold*, 1635, Cro. Car. 447; *Swift v. Eyres*, 1636, Cro. Car. 548. The object in such cases is, to interpret the instrument by ascertaining the intent of the parties; and the rule to find the intent is, to give most effect to those things about which men are least liable to mistake: *Davis v. Rainsford*, 1821, 17 Mass. 210 (Am.); *McIver v. Walker*, 1815, 9 Crunch,

178 (Am.).

³ *Selwood v. Mildmay*, 1797, 3 Ves. 306; *Lindgren v. Lindgren*, 1846, 15 L. J. Ch. 428.

⁴ In *Miller v. Travers*, 1832, 8 Bing. 250; *Doe v. Hiscocks*, 1839, 9 L. J. Ex. 27.

⁵ *Lindgren v. Lindgren*, 1846, 15 L. J. Ch. 428. See, also, *Quennell v. Turner*, 1851, 20 L. J. Ch. 237; *Tann v. Tann*, 1863, 2 New R. 412 (Romilly, M.R.); and *Hart v. Tulk*, 1852, 22 L. J. Ch. 649, where the Lords Justices, to set right what they thought was an obvious clerical error, held that the words, "fourth schedule," in a will, should be read as if they were "fifth schedule."

§ 1223. In connexion with the rule as to “*falsa demonstratio*,” &c., a somewhat arbitrary rule of equitable construction, with reference to the interpretation of wills, may be noticed. This is, that if legacies be given to any specified number of children, as, for instance, 500*l.* apiece to the three children of A., and it turn out that at the date of the will A. had any larger number of children, the Court will reject the number mentioned in the will, upon the presumption of mistake, and will award a legacy of 500*l.* to each of A.’s children.¹ This rule, however, only applies where the testator’s intention to benefit the whole class appears by the will.²

§§ 1223,
1224.

§ 1224. False statements, introduced into an instrument by way of affirmation only, may, as we have seen, be rejected, provided the remaining description be sufficient to identify the person or thing intended. But they cannot be disregarded, if they have been used by way of *exception* or *limitation*; because in this latter case, it is obvious that they were intended to have a *material* operation.³ Moreover, if there be one subject-matter as to which all the demonstrations in a written instrument are true, and another as to which part are true and part false, the instrument shall be intended to contain words to pass only that subject-matter, as to which all the circumstances are true.⁴ Such is the correct meaning of the maxim enunciated by Lord Bacon, “*Non accipi debent verba in demonstrationem falsam quæ competunt in limitationem veram.*”⁵ For example, on a devise of “all my messuages situate at, in, or near Snig Hill, which I lately purchased of the Duke of Norfolk;” it appearing that the testator had bought of the Duke four houses very near Snig Hill, and two at some considerable distance from

¹ *Daniell v. Daniell*, 1840, 18 L. J. Ch. 157; *McKechie v. Vaughan*, 1873, L. R. 15 Eq. 289; *Morrison v. Martin*, 1846, 5 Hare, 507; *Lee v. Pain*, 1844, 14 L. J. Ch. 346; *Scott v. Fenoulhett*, 1784, 1 Cox, Ch. 79; *Yeats v. Yeats*, 1852, 16 Beav. 170; *In re Groom*, 1897, 2 Ch. 407 (North, J.). See *Wrightson v. Calvert*, 1860, 1 J. & H. 250; *Newman v. Piercey*, 1876, 4 Ch. D. 41.

² *In re Stephenson*, [1897] 1 Ch. 75; and see *In re Mayo*, [1901] 1 Ch. 404, where Farwell, J. held that under a bequest “to the three children of A.

born prior to her marriage, a fourth *illegitimate* child, of whose existence the testator was ignorant, could not be brought in.

³ *Taylor v. Parry*, 1840, 1 M. & Gr. 604.

⁴ *Doe v. Bower*, 1832, 3 B. & Ad. 459; *Ex parte Kirk*. *In re Bennett*, 1877, 5 Ch. D. 800 (C. A.).

⁵ *Morrell v. Fisher*, 1849, 19 L. J. Ex. 273 (Alderson, B.). See, also, *Boyle v. Mulholland*, 1860, 10 Ir. C. L. R. 150; *Horner v. Horner*, 1877, 46 L. J. Ch. 617; 47 L. J. Ch. 635.

§§ 1224— it, and in a place bearing a different name; the Court held that
1226. the four houses only passed by the devise, though all the six had been purchased by one conveyance, and the testator had redeemed the land tax upon all by one contract;¹ and under a bill of sale assigning “all the household goods of every description at No. 2, Meadow Place, more particularly set forth in an inventory of even date herewith,” no goods will pass except those specified in the inventory.³

§ 1225. On the same principle, too, where a testator devised to A. his *freehold* messuage, farms, lands, and hereditaments, in the county of B., and it appeared that he had a farm in that county, consisting of a messuage and 116 acres, the greater part of which was freehold, but a small portion was leasehold for a long term of years at a peppercorn rent, it was held that as the devise correctly described the freehold, the leasehold part was not included therein, though this part was interspersed with, and undistinguishable from, the freehold, and the whole farm had always been treated as freehold by the testator.³ This rule of construction will (it is said) be enforced with greater strictness, where an interpretation is to be put upon a devise of real estate, than in other cases; it being an established doctrine of construction, that an heir-at-law shall not be disinherited *except* by express words.⁴

§ 1226. From what precedes, the following rules may be collected. First, where in a written instrument the description of the person or thing intended is *applicable with legal certainty to each of several subjects*, extrinsic evidence, including proof of declarations of intention, is admissible to establish which of such subjects was intended by the author.⁵ Secondly, if the description of the person or thing be *partly applicable and partly inapplicable to each*

¹ Doe v. Bower, 1832, 3 B. & Ad. 453; Homer v. Homer, 1878, 8 Ch. D. 758 (C. A.); Pogson v. Thomas, 1840, 6 Bing. N. C. 337; Doe v. Ashley, 1847, 16 L. J. Q. B. 356; Webber v. Stanley, 1864, 33 L. J. C. P. 217; Smith and Goddard v. Ridgway, 1866, 2 H. & C. 37; 4 H. & C. 577 (Ex. Ch.); Pedley v. Dodds, 1866, L. R. 2 Eq. 819.

² Wood v. Rowcliffe, 1851, 20 L. J. Ex. 285; Morrell v. Fisher, 1849, 19 L. J. Ex. 273; Barton v. Dawes,

1850, 19 L. J. C. P. 302.

³ Stone v. Greening, 1843, 13 Sim. 390; Hall v. Fisher, 1844, 1 Coll. 47; Quennell v. Turner, 1851, 20 L. J. Ch. 237; Evans v. Angell, 1858, 26 Beav. 202. See, also, Gilliat v. Gilliat, 1860, 28 Beav. 481; Mathews v. Mathews, 1867, L. R. 4 Eq. 278.

⁴ Doe v. Bower, 1832, 3 B. & Ad. 459.

⁵ Wigr. Wills, 160.

of several subjects, though extrinsic evidence of the surrounding circumstances may be received for the purpose of ascertaining to which of such subjects the language applies, yet evidence of the author's declarations of intention will be inadmissible.¹ Thirdly, if the description be partly correct and partly incorrect, and the correct part be sufficient of itself to enable the Court to identify the subject intended, while the incorrect part is *inapplicable to any subject*, parol evidence will be admissible to the same extent as in the last case, and the instrument will be rendered operative by rejecting the erroneous statements.² Fourthly, if the description be *wholly inapplicable* to the subject intended or said to be intended by it, evidence cannot be received to prove whom or what the author really intended to describe.³ Fifthly, if the language of a written instrument, when interpreted according to its primary meaning, be insensible with reference to extrinsic circumstances, collateral facts may be resorted to, in order to show that in some secondary sense of the words, and in one in which the author meant to use them, the instrument may have a full effect.⁴

§ 1227.⁵ It only remains to notice a class of cases to which allusion has before been made⁶—namely, cases in which such evidence is offered to rebut an equity⁷—when parol declarations of intention, in common with other extrinsic evidence, are allowed to affect the operation of a writing, though the writing is on its face free from ambiguity. Where the principles of Equity raise a presumption against the apparent intention of a written instrument, such presumption may be repelled by extrinsic evidence, whether of declarations, or of collateral facts, showing the intention to be otherwise.⁸ The simplest instance of this is when two legacies are left to the same person by different testamentary instruments. Contrary to the general rule,⁹ these are, *prima facie*, presumed not to have been intended

§§ 1226,
1227.

¹ *Doe v. Hiscocks*, 1839, 9 L. J. Ex. 27.

² *Wigr. Wills*, 67-70.

³ *Id.* 133.

⁴ *Doe v. Hiscocks*, 1839, 9 L. J. Ex. 27; *Wigr. Wills*, 11, cited ante, § 1131, n.

⁵ *Gr. Ev.* § 296, in part.

⁶ *Supra*, § 1202.

⁷ See *Buckley v. Littlebury*, 1711,

3 Bro. P. C. 43; *Francis v. Dichfield*, 1742, 2 Coop. 532.

⁸ *Hall v. Hill*, 1841, 1 Dru. & War. 116 (Ir.); *Hurst v. Beach*, 1810, 5 Madd. 351; *Trimmer v. Bayne*, 1802, 7 Ves. 518.

⁹ See *Russell v. Dickson*, 1853, 4 H. L. C. 293; *Breenan v. Moran*, 1857, 6 Ir. Ch. R. 126; *Wilson v. O'Leary*, 1872, L. R. 12 Eq. 525;

**§§ 1227,
1228.**

as cumulative, if the sums and the expressed motives of both exactly correspond.¹ But to rebut this presumption parol evidence of every kind will be received. The effect, indeed, of such evidence is not to show that the testator did not mean what he said, but, on the contrary, to prove that he did mean what he has expressed.² Extrinsic evidence is also admissible to repel the *prima facie* presumption against double portions,³ which is raised when a father makes a provision for his daughter by settlement on her marriage, and afterwards provides for her by his will;⁴ or to rebut the presumption that a portionment⁵ of a legatee by a parent or person in *loco parentis*⁶ was intended to operate as an ademption (though only *pro tanto*)⁷ of the legacy.⁸

§ 1228. So, again, to rebut the somewhat forced equitable presumption that a debt due from a testator is intended to be satisfied by a legacy of a greater or equal amount bequeathed by him to his creditor,⁹ the courts have for a long period eagerly

L. R. 7 Ch. 448; *Hubbard v. Alexander*, 1876, 3 Ch. D. 738.

¹ *Tatham v. Drummond*, 1864, 33 L. J. Ch. 438; *Tuckey v. Henderson*, 1863, 33 Beav. 174.

² *Hurst v. Beach*, 1821, 5 Madd. 351; recognised in *Hall v. Hill*, 1841, 1 Dru. & War. 116 (Ir.) (Sugden, C.); and by C. A. in *Re Tussaud's Estate*, 1878, 9 Ch. D. 363.

³ See *Montague v. Montague*, 1852, 15 Beav. 565; *In re Lawes*, 1882, 20 Ch. D. 81. This presumption is not recognised in Scotland: *Kippen v. Darley*, 1858, 3 Macq. 203 (H. L.); *Johnstone v. Haviland*, [1896] A. C. 95.

⁴ *Weall v. Rice*, 1831, 2 Russ. & My. 251, 267; *Id.* *Glengall v. Barnard*, 1836, 6 L. J. Ch. 25; *Hall v. Hill*, 1841, 1 Dr. & War. 116 (Ir.) (Sugden, C.), explaining and limiting the two former cases. See *Lady E. Thynne v. Id.* *Glengall*, 1848, 2 H. L. C. 131; *Chichester v. Coventry*, 1867, L. R. 2 H. L. 71; *Re Tussaud's Estate*, 1878, 9 Ch. D. 363 (C. A.); *Nevin v. Drysdale*, 1867, L. R. 4 Eq. 517; *Dawson v. Dawson*, 1867, L. R. 4 Eq. 504 (*id.*); *Russell v. St. Aubyn*, 1876, 2 Ch. D. 398; *Bennett v. Houldsworth*, 1877, 6 Ch. D. 671; *Edgeworth v. Johnston*, 1877, Ir. R. 11 Eq. 326; *Curtis v.*

Mackenzie, 1877, W. N. 213.

⁵ This need not be by deed, or in consideration of marriage: *Leighton v. Leighton*, 1874, L. R. 18 Eq. 458.

⁶ See *Palmer v. Newell*, 1855, 24 L. J. Ch. 424; *Campbell v. Campbell*, 1866, L. R. 1 Eq. 383.

⁷ *Pym v. Lockyer*, 1840, 10 L. J. Ch. 153; recognised in *Suisse v. Lowther*, 1843, 12 L. J. Ch. 315. See *Montefiore v. Guedalla*, 1860, 29 L. J. Ch. 65; *Fowkes v. Pascoe*, 1875, L. R. 10 Ch. 343; *Ravenscroft v. Jones*, 1864, 33 L. J. Ch. 482; *Watson v. Watson*, 1864, 33 Beav. 574; *In re Peacock's Estate*, 1872, L. R. 14 Eq. 236.

⁸ *Trimmer v. Bayne*, 1802, 7 Ves. 515; *Hall v. Hill*, 1841, 1 Dr. & War. 116 (Ir.); *Cooper v. Macdonald*, 1873, L. R. 16 Eq. 258 (*Ld. Selborne, C.*); *Curtin v. Evans*, 1872, Ir. R. 9 Eq. 553; *Kirk v. Eddowes*, 1844, 13 L. J. Ch. 402; *Hopwood v. Hopwood*, 1860, 7 H. L. C. 728; *Schofield v. Heap*, 1859, 28 L. J. Ch. 104; *Beckton v. Barton*, 1859, 28 L. J. Ch. 673; *Phillips v. Phillips*, 1864, 34 Beav. 19. See *ante*, § 1146.

⁹ *Brown v. Dawson*, 1705, Prec. in Ch. 240; *Fowler v. Fowler*, 1735, 3 P. Wms. 353; *Atkinson v. Littlewood*, 1874, L. R. 18 Eq. 595.

caught at any trifling circumstance, whether arising out of the language of the will,¹ or brought under their notice by extrinsic evidence,³ which will afford an excuse for evading a rule of such questionable policy.³ The presumption of a resulting trust in favour of the person who paid the purchase-money, which arises where a man purchases property in the name of a stranger, affords another illustration.⁴ For the stranger may give parol evidence to show that the purchase was really intended for his benefit—in other words, he may rebut the presumption, and support the instrument.⁵

§§ 1228—
1230.

§ 1229. In all these cases, when parol evidence has been *first* admitted to show that the presumption drawn by the law is not in accordance with the real intention of the author of the instrument, counter evidence will be received to *fortify* the presumption. The evidence on either side is admissible, not for the purpose of proving, in the first instance, with what intent the writing was made, but simply with the view of ascertaining whether the presumption, which the law has raised, is well or ill founded.⁶ But in the absence of evidence to countervail the presumption, no parol evidence in support of it can be adduced. In the first place, such evidence would be unnecessary; and next, its effect, if it had any, would be to contradict the language of the instrument.⁷ If, therefore, the circumstances are on the face of the instrument such as to rebut the presumption drawn by the law, or if the Court does not raise any presumption at all, parol evidence to fortify the presumption in the one case, or to create it in the other, will be alike inadmissible; because, in either event, the effect of the evidence would be to contradict the apparent meaning of the writing.⁸

§ 1230. A good illustration of this distinction is afforded by a

¹ *Rowe v. Rowe*, 1848, 17 L. J. Ch. 357; *Matthews v. Matthews*, 1755, 2 Ves. Sen. 636; *Bartlett v. Gillard*, 1826, 3 Russ. 156.

² *Wallace v. Pomfret*, 1805, 11 Ves. 547.

³ See *Edmunds v. Low*, 1857, 26 L. J. Ch. 432.

⁴ *Ante*, § 1017.

⁵ *Hall v. Hill*, 1841, 1 Dr. & War. 116 (Ir.) (Sugden, C.). See,

also, *Sidmouth v. Sidmouth*, 1840, 9 L. J. Ch. 282; *Williams v. Williams*, 1863, 32 Beav. 370; *Nicholson v. Mulligan*, 1868, Ir. R. 3 Eq. 308.

⁶ *Kirk v. Eddowes*, 1844, 13 L. J. Ch. 402; *Hall v. Hill*, 1841, 1 Dr. & War. 116 (Ir.); *Ferris v. Goodburn*, 1858, 27 L. J. Ch. 574.

⁷ *Id.*

⁸ *Palmer v. Newell*, 1855, 24 L. J. Ch. 424.

§§ 1230,
1231.

case¹ where a father, upon the marriage of his daughter, had given a bond to the husband to secure the payment of 800*l.*, part to be paid during his life, and the residue at his decease, and subsequently by his will bequeathed to his daughter a legacy for 800*l.* Parol evidence of the testator's declaration that the legacy was intended as a satisfaction of the debt, was tendered, and, if admissible, was conclusive;² but it was decided, that though the debt was to be regarded in the light of a portion,³ yet that as it was due to the daughter's husband, while the legacy was left to the daughter herself, the ordinary presumption against double portions was rebutted by the language of the instruments, or, rather, could not, under the circumstances, be raised, and that the declaration must, consequently, be rejected. The evidence would have been equally inadmissible in the first instance, on the ground of its inutility, if the ordinary presumption had arisen. But, in this event, had the opponent offered parol evidence to show that the testator intended that the debt should not be satisfied by the legacy, the evidence rejected might then have been received with overwhelming effect, to corroborate and establish the presumption of law.

§ 1231. To clearly understand this subject, it is essential to distinguish between mere *legal presumptions* and *rules of construction*. For *presumptions* may be rebutted, and being rebuttable may also be supported by parol testimony. But no evidence can be received on either side, if the court can, *by construction*, arrive at a conclusion respecting the meaning of the instrument.⁴ Important as this distinction is, it is by no means easy on all occasions to observe it. The difficulty is increased by the loose manner in which the word "presumption" has occasionally been used. For instead of its being confined to its strict sense, as meaning an inference raised by the Courts independently of,

¹ Hall v. Hill, 1841, 1 Dr. & War. 116 (Ir.), in which the judgment (Sugden, C.) contains an elaborate discussion of all the important authorities on the subject. The cases of Wallace v. Pomfret, 1805, 11 Ves. 542; Coots v. Boyd, 1789, 2 Bro. C. C. 521; Weall v. Rice, 1831, 9 L. J. Ch. 116; Booker v. Allen, 1831, 9 L. J. Ch. 130; and Lloyd v. Harvey, 1832,

2 Russ. & My. 310, are here much shaken, if not overruled.

² Hall v. Hill, 1841 (Ir.), as reported 1 Dru. & War. 112.

³ Id. 108, 109.

⁴ Lee v. Pain, 1845, 14 L. J. Ch. 346; Hall v. Hill, 1841, 1 Dr. & War. 116 (Ir.); Barrs v. Fewkes, 1865, 34 L. J. Ch. 522.

or against, the words of an instrument, it is often employed as denoting an inference in favour of a given construction of particular language.¹ Thus Lord Thurlow once remarked:²—“Where the *presumption* arises from the construction of words, simply quâ words, no evidence can be admitted,”—evidently using the word *presumption* as tantamount to a rule of law. Among other rules of construction,³ occasionally miscalled legal presumptions, is the one (now clearly established) which awards to a stranger legatee as many legacies as are bequeathed to him by separate instruments, unless the instruments themselves contain *intrinsic* evidence that the legacies were not intended to be cumulative, or unless the double coincidence of the same amounts and the same expressed motives appearing in each instrument, induces the court to presume that repetition, and not accumulation, was intended.⁴ Extrinsic evidence cannot be received to impugn this rule of construction, since to admit it would be to construe a writing by parol evidence.⁵

§ 1231.

¹ Lee v. Pain, 1845, 14 L. J. Ch. 346.

² Coote v. Boyd, 1789, 2 Bro. C. C. 521.

³ For other rules of construction relating to wills, see 7 W. 4 & 1 V. c. 26 (“The Wills Act, 1837”), §§ 24 (rendered applicable to the estates of married women by § 4 of “The Married Women’s Property Act, 1893,” being 56 & 57 V. c. 63) to 33;

Re George’s Estate, King v. George, 1877, 46 L. J. Ch. 670 (C. A.); Everett v. Everett, 1877, 7 Ch. D. 428 (C. A.); In re Ord, 1878, 9 Ch. D. 667.

⁴ Hurst v. Beach, 1821, 5 Madd. 351; Suisse v. Lowther, 1843, 12 L. J. Ch. 315; Lee v. Pain, 1845, 14 L. J. Ch. 346; Kirk v. Eddowes, 1844, 13 L. J. Ch. 402; Roch v. Callen, 1847, 17 L. J. Ch. 144.

⁵ Id.

PART V.

INSTRUMENTS OF EVIDENCE.

CHAPTER I.

WITNESSES, AND THE MEANS OF PROCURING THEIR ATTENDANCE.

§§ 1232—
1234a.

§ 1232. The *Fifth Part* of this work will treat of the Instruments of evidence, or in other words, of the means by which facts are proved. It will be endeavoured to show how such instruments are obtained, in what manner they are used, to what extent, and under what circumstances, they are admissible, and what is their effect.

§ 1233.¹ Now, the Instruments of Evidence are of two classes—the *unwritten* and the *written*. By *unwritten*, or *oral evidence*, is meant the testimony given by witnesses, *vivà voce*, either in open court, or before a magistrate or other officer, acting by virtue of a commission or other legal authority. Under this head will be briefly considered, first, the methods, in general, of procuring the attendance and testimony of witnesses; secondly, the competency of witnesses; and, thirdly, the practice which obtains in the examination of witnesses, and herein, of the impeachment and corroboration of their testimony.

§ 1234. The attendance of witnesses, whether for the prosecution or the defence, before justices of the peace is enforced by summons,² or if necessary by Crown Office subpoena.

§ 1234A. Witnesses who have given evidence before justices of the peace are, if the accused be committed for trial or if notice of

¹ Gr. Ev. §§ 307, 308, in great part. Summary Jurisdiction Act, 1848"), § 7; 42 & 43 V. c. 49 ("The Summary Jurisdiction Act, 1879"), § 36.

² See 11 & 12 V. c. 43 ("The

appeal is given, usually bound over by recognisance to attend and give evidence at the trial or hearing of the appeal. A *recognisance* is a bond of record, testifying that the recognisor owes the Queen a certain sum, to be levied on his goods and tenements for the use of her Majesty, if he fail to appear and give evidence at the time and place specified in the condition.¹ By the Indictable Offences Act, 1848,² the justice before whom the preliminary investigation is heard, is authorised in all cases, whether of felony or misdemeanor, to bind by recognisance all such persons as know the facts or circumstances of the case, to appear and give evidence before the grand jury and at the trial against the party accused;³ and the Coroners Act, 1887,³ gives similar power to all coroners taking an inquisition, whereby any person shall be indicted for manslaughter or murder, or as an accessory to murder before the fact. These provisions respectively apply to justices and coroners, not only of counties, but of all other jurisdictions.⁴ In order to avoid any hardship from indiscriminate estreat, it is enacted that the officer of the court, by whom the estreats are made out, shall prepare a written list of defaulters, specifying the name, residence, and trade or profession of each, the nature of the offence respecting which he was to testify, the cause, if known, of his absence, and the fact whether by reason of his non-attendance the ends of justice have been defeated or delayed. This list must then be laid before the judge at the assizes, or before the recorder or other corporate officer, or the chairman or two other justices of the peace at the sessions, who are respectively required to examine it, and to make such order touching the estreating of the recognisances as they shall consider just; but no recognisance can be

§ 1234a.

¹ See Form No. 36 in Appendix to Rules under "The Summary Jurisdiction Act, 1879," issued 16 July, 1886.

² 11 & 12 V. c. 42, § 20. The corresponding Irish Act (14 & 15 V. c. 93) enacts, in § 13, cl. 6, that "whenever in cases of indictable offences the justice or justices shall see fit, they may bind the witnesses by recognisance to appear at the trial of the offender and give evidence against him," and if such witnesses refuse

to be bound, they may be committed. The form of the recognisance is given in the schedule.

³ 50 & 51 V. c. 71, § 5; 9 G. 4, c. 54, § 4, Ir.

⁴ 11 & 12 V. c. 42 ("The Indictable Offences Act, 1848"), §§ 1, 16, 20, the latter section being amended by "The Summary Jurisdiction Act, 1879" (42 & 43 V. c. 49); 7 G. 4, c. 64 ("The Criminal Law Act, 1826"), § 6; 14 & 15 V. c. 93, § 44, Ir.

**§§ 1234a
—1237-8.**

estreated or put in process, without the written order of the presiding judge or other persons, before whom the list has been laid.¹ It seems that a recognisance to prosecute or give evidence is binding on an infant; at least it has been held that infancy is no ground for discharging a forfeited recognisance to appear at the assizes to prosecute for felony.²

§ 1235. If a witness, after having been examined on oath before a magistrate or coroner, refuse to be bound over, he may be committed;³ and where a married woman, who could not enter into her own recognisances, refused either to appear at the sessions or to find sureties for her appearance, the justice was held fully warranted in committing her, in order that she might be forthcoming as a witness at the trial.⁴ But a justice cannot commit any witness for refusing to find sureties to be bound with him, who is willing to enter into his own recognisance.⁵

§ 1236. By an Act passed in 1867, every committing justice must ask the accused "whether he desires to call any witnesses," and if he answers in the affirmative, the witnesses are sworn, and examined; their depositions are reduced to writing;⁶ and "such witnesses,—not being witnesses merely to the character of the accused,—as shall in the opinion of the justice give evidence in any way material to the case, or tending to prove the innocence of the accused, shall be bound by recognisance to appear and give evidence at the trial."⁷

§§ 1237-8. Formerly, committing justices in various cases in which they might convict summarily, but in which an appeal from their decisions lay to the quarter sessions, had power on notice of such an appeal being given, to bind the witnesses in the cases over by recognisance to appear at quarter sessions on the hearing of the appeal. Other statutes giving a right of

¹ 7 G. 4, c. 64 ("The Criminal Law Act, 1826"), § 31; 9 G. 4, c. 54, § 34, Ir.

² Ex parte Williams, 1824, 13 Price, 670.

³ 11 & 12 V. c. 42 ("The Indictable Offences Act, 1848"), § 20; Bennet v. Watson, 1814, 3 M. & Selw. 1; 9 G. 4, c. 54, § 2, Ir. See

Ashton's case, 1845, 7 Q. B. 169.

⁴ Bennet v. Watson, 1814, 3 M. & Selw. 1.

⁵ Graham, B., as cited 2 Burn, Just. 122; Evans v. Rees, 1839, 2 P. & D. 627 (Ld. Denman).

⁶ 30 & 31 V. c. 35, §§ 3 and 4, cited ante, § 490, n.

⁷ Id. § 3.

appeal to quarter sessions did not however confer on the Court of Summary Jurisdiction such power, and now by the Summary Jurisdiction Act, 1879,¹ it is provided,² “Where, in pursuance of any Act, whether past or future, any person is adjudged by a conviction or order of a Court of Summary Jurisdiction to be imprisoned without the option of a fine, either as a punishment for an offence, or, save as hereinafter mentioned, for failing to do or to abstain from doing any act or thing required to be done or left undone, and such person is not otherwise authorised to appeal to a Court of General or Quarter Sessions, and did not plead guilty, or admit the truth of the information or complaint, he may notwithstanding anything in the said Act, appeal to a Court of General or Quarter Sessions against such conviction or order: Provided that this section shall not apply where the imprisonment is adjudged for failure to comply with an order for the payment of money, for the finding of sureties, for the entering into any recognisance, or for the giving of any security.” The attendance of the witnesses on the hearing of any appeal under the above section is secured by means of the issue of a Crown Office subpoena to attend the Court of Quarter Sessions.

§ 1239.³ This brings us to the second mode in which the attendance of witnesses may be procured in criminal cases. This is by means of a Crown Office subpoena. A “subpoena” is the ordinary mode of summons to attend as a witness at trials of any civil case, being served upon the witness. This is a judicial writ, which the proper officer, on production to him of a præcipe in due form for filing,⁴ is bound to issue at the instance of the party applying for it, without any order of the court for that purpose having first been obtained.⁵ It must, in the High Court, be in one or other of seven Forms given in the Rules;⁶ containing, if the witness be required to produce any documents, a clause to that effect, in which case the writ is termed a *subpoena duces tecum*. When the attendance of a

¹ 42 & 43 V. c. 49.

² § 19.

³ Gr. Ev. § 309, in part.

⁴ R. S. C. 1883, Ord. XXXVII.

r. 26, and Form 21 in App. G.

⁵ *Holden v. Holden*, and *Hill v. Dolt*, 1857, 7 De G. M. & G. 397.

⁶ See Ord. XXXVII. r. 27; and Forms 1 to 7 in App. J.

**§§ 1239,
1240.**

witness is required to be given before a court possessing criminal jurisdiction, it is (as in civil cases) commanded by "subpœna," but such subpœna is issued out of the Crown Office Department of the Court of Queen's Bench, and is hence briefly called "a Crown Office subpœna." A Crown Office subpœna may either simply require the attendance of the witness, or be a subpœna *duces tecum*. When a Crown Office subpœna is required to secure the attendance of a witness at petty sessions, quarter sessions, or assizes, it cannot be obtained from the Clerk of the Peace or from the Clerk of Assize. Its issue must be obtained from the Crown Office in London. This is usually done by the London agents of the solicitor employed by the party by whom the attendance of the witness, before either of the tribunals just mentioned, is required. A few days ought usually to be allowed for procuring the writ, but, in urgent cases, it may be obtained by return of post, or even in answer to a telegram to agents in London in a much less time. The application at the Crown Office for a Crown Office subpœna is made by a solicitor or by a solicitor's clerk, but it is sometimes made by the party in person. An applicant for a Crown Office subpœna fills up a proper form of subpœna on parchment with the name of at least one witness, pays for and affixes to it a stamp for five shillings, upon which it is sealed for him. Subpœnas are not allowed to be issued in blank except to the police and to the solicitors to the Treasury. A Crown Office subpœna may be obtained where a summons to a witness has been issued instead of reliance being entirely placed upon the summons being "backed" under the provisions of the Summary Jurisdiction Acts.¹ But in general a Crown Office subpœna will not be sealed for parties in person till after particular enquiry by the Crown Office into the matter, and on their being satisfied that such subpœna is not sought for some malicious purpose or for annoyance. A Crown Office subpœna may be served anywhere in England.

§ 1240. A subpœna *duces tecum* must specify with reasonable distinctness the particular documents required; and a general

¹ See *infra*, § 1318A.

direction to produce all papers relating to the subject in dispute will not be enforced.¹ When a witness is served with a subpoena duces tecum, he is bound to attend with the documents demanded therein, if he has them in his possession, and he must leave the question of their actual production to the judge, who will decide upon the validity of any excuse that may be offered for withholding them.² For example, an attachment will lie against an overseer or solicitor of a parish, who, in an inquiry touching the settlement of a pauper, refuses to bring the rate-books of such parish to the petty sessions, in obedience to a Crown Office subpoena; though it may be very questionable whether he would be bound to submit these books to examination, in the event of his bringing them into court.³ Moreover, as a rule, even the fact that the legal custody of the document belongs to another person will not authorise a witness to disobey the subpoena, where such document is in his actual possession.⁴ But documents filed in a public office are not so in the possession of a clerk there, as to render it necessary, or even allowable, for him to bring them into court without the permission of the head of the office;⁵ and the secretary of a company will not be attached for declining to produce at a trial documents which have been entrusted to him simply as a servant of the company, and which the directors have specially forbidden him to produce.⁶

§§ 1240,
1241.

§ 1241. A writ of subpoena, though commanding the witness to attend "from day to day until the cause be tried," suffices for only one sitting of the court, or for one assize; and, therefore if the cause be made a remanet, or be adjourned to another session, or assize, the writ must be resealed, and the witness summoned anew.⁷ Again, if any alteration be made in the writ, after it is sued out, though before it is served, it must be resealed;⁸ and, therefore, when the day of appearance named in a subpoena was

¹ *Lee v. Angas*, 1866, L. R. 1 Eq. 59; *Att.-Gen. v. Wilson*, 1839, 8 L. J. Ch. 119.

² *Amey v. Long*, 1808, 9 East, 473. See ante, § 23; and as to what is a valid excuse, see ante, §§ 458—460.

³ *R. v. Greenaway*, and *R. v. Carey*, 1845, 7 Q. B. 126.

⁴ *Amey v. Long*, 1807, 9 East, 473.

⁵ *Thornhill v. Thornhill*, 1820, 2 Jac. & W. 347; *Austin v. Evans*, 1841, 2 M. & Gr. 430.

⁶ *Crowther v. Appleby*, 1873, L. R. 9 C. P. 23.

⁷ *Sydenham v. Rand*, 1784, 3 Doug. 429.

⁸ See Ord. XXXVII. r. 31.

§§ 1241— altered by an attorney from one term to another, it was held that
1242. the writ thereby became void, and that a witness, on whom it was served subsequently to the alteration, might treat it as waste paper.¹

§ 1241A. An ordinary writ of subpoena differs from a subpoena duces tecum in this respect, that while the former "contains three names when necessary or required, and may contain any larger number of names,"² the latter cannot include more than three persons, and the party suing it out may, if it be deemed desirable, have a separate writ for each person.³

§ 1242.⁴ The service of a subpoena upon a witness is of no validity if not made within twelve weeks after the *teste* of the writ.⁵ It must also in all cases be made a *reasonable time* before trial, to enable the witness to put his affairs in such order, that his attendance on the court may be as little detrimental as possible to his interests.⁶ A writ of subpoena may, as a general rule, be served at any stage of proceedings in an action, yet, service at a time, when to the knowledge of the parties the action cannot possibly be tried during the current sittings amounts to an abuse of the process of the court and ought to be set aside.⁷ A summons in the morning to attend in the afternoon of the same day is insufficient, though the witness live in the same town, and very near to the place of trial.⁸ Where, however, a witness was served at noon, while standing on the steps of the Court-house, and being then told that the cause was coming on that day, replied, "Very well," his non-attendance at five o'clock, when the trial was heard, was held to render him liable to an action, since his answer was equivalent to an admission that the service was in time.⁹ If a witness attend a trial in obedience to a subpoena, he cannot refuse to be examined on the ground of any irregularity in the service.¹⁰ If, too, a witness be in court as a spectator, he

¹ Barber v. Wood, 1838, 2 M. & Rob. 172.

² Ord. XXXVII. r. 29.

³ R. 30.

⁴ Gr. Ev. § 314, in part.

⁵ R. 34.

⁶ Hammond v. Stewart, 1734-5, 1 Str. 510.

⁷ London and Globe Finance

Corpn. v. Kaufman, 1900, 69 L. J. Ch. 196 (North, J.).

⁸ Id.; Barber v. Wood, 1838, 2 M. & Rob. 172.

⁹ Maunsell v. Ainsworth, 1840, 8 Dowl. 869; Jackson v. Seagar, 1844, 2 Dowl. & L. 13.

¹⁰ Wisden v. Wisden, 1849, 6 Beav. 549.

cannot, it seems, object to give evidence, on the ground that the subpoena has only just been served upon him;¹ though, if he be a solicitor, who is engaged in winding up another cause, the rule may be different; and it is highly probable that he would not be liable to an attachment for disobedience.² Moreover, in criminal prosecutions, a witness cannot decline to be sworn, though he has not been subpoenaed at all.³ In civil cases a witness may, however, always refuse to be examined, unless he be properly served with a subpoena, "proper service" being only effected when accompanied by the payment of proper "conduct money."⁴ But an objection to give evidence which is founded on this ground must be made before the witness is sworn, and will not be entertained afterwards.

§§ 1242,
1243.

§ 1243. Where a subpoena, requiring the attendance of a witness on the 31st of March, and so on from day to day until the action should be tried, was served on the 2nd of April, when the witness was distinctly told that the trial had not come on, he was held civilly responsible for disobeying the writ on the 6th of April when the cause was heard;⁵ though, had he received no notice at the time of service that the cause had not then been tried, the result might have been different, and he would at least have avoided the penalty of an attachment.⁶ The question whether a subpoena has been served within a reasonable time is, however, entirely one for the discretion of the judge,⁷ and will vary according to the circumstances of each case.⁸

¹ *Doe v. Andrews*, 1778, 2 Cowp. 845.

² *Pitcher v. King*, 1845, 2 Dowl. & L. 755.

³ *R. v. Sadler*, 1830, 4 C. & P. 218.

⁴ *Bowles v. Johnson*, 1748, 1 W. Bl. 36; contra *Blackburn v. Hargrave*, 1828, 2 Lewin, C. C. 259, where *Hullock, B.*, is reported to have held that, if a witness be in court, having come there on other business, he cannot refuse to be sworn, though his expenses be not tendered, is never followed in practice. Indeed, *Hullock, B.*, in the very case just cited, held that a witness is not bound to obey a subpoena in a civil cause, unless his expenses be tendered, although the party who requires his

testimony is suing in formâ pauperis.

⁵ *Davis v. Lovell*, 1839, 8 L. J. Ex. 152.

⁶ *Alexander v. Dixon*, 1823, 1 Bing. 366.

⁷ *Barber v. Wood*, 1838, 2 M. & Rob. 172; ante, § 23.

⁸ See, further, the analogous cases respecting the reasonable service of a notice to produce, ante, § 445. In the United States, the reasonableness of the time is generally fixed by statute, one day being usually allowed for every twenty miles that intervene between the residence of the witness and the place of trial. Perhaps a somewhat similar rule might with advantage be adopted in this country.

§§ 1244—
1246.

§ 1244. Under the R. S. C., 1883, "the *service* of a subpoena shall be effected by delivering a copy of the writ, and of the indorsement thereon, and at the same time producing the original writ."¹ Personal service will not be dispensed with, even though it be sworn that the witness keeps out of the way to avoid such service;² and the provision, which requires the production of the original writ at the time of serving the copy, must be strictly followed, since otherwise the witness cannot be chargeable with a contempt in not appearing upon the summons.³ Again,⁴ "affidavits filed for the purpose of proving the service of a subpoena upon any *defendant*, must state when, where, and how, and by whom, such service was effected."

§ 1245. If the copy of the writ vary in any material degree from the original subpoena, as where the copy required the witness to attend on the 24th of May, and the writ itself specified the 27th, an attachment for disobedience cannot be obtained.⁵ The writ, too, must state, with reasonable certainty, the name of the cause, as also the place in which the attendance of the witness is required.⁶ Where, however, a subpoena required the attendance of the witness at Westminster Hall, the *Nisi Prius* sittings being in fact held at the adjoining sessions-house, it was ruled that an attachment might be granted for non-attendance at the sessions-house, notices having been affixed to the wall of the court in Westminster Hall, directing witnesses to proceed to that place.⁷ So, where a subpoena, tested the 9th of May and served on the 19th required attendance on the 21st of March instant, this was considered an error which could not mislead.⁸

§ 1246. A witness served with a subpoena is, in civil cases, entitled to be paid or tendered his expenses.⁹ By an Act of Parliament of the reign of Elizabeth,⁹ if any person, upon whom

¹ Ord. XXXVII. r. 32.

² See *In re Pyne*, 1843, 13 L. J. Q. B. 37.

³ *Wadsworth v. Marshall*, 1832, 1 C. & M. 87; *R. v. Wood*, 1832, 1 Dowl. 509; *Garden v. Cresswell*, 1837, 2 M. & W. 319; *Jacob v. Hungegate*, 1835, 1 M. & Rob. 445; *Pitcher v. King*, 1845, 2 Dowl. & L. 755.

⁴ By R. S. C. Ord. XXXVII. r. 33.

⁵ *Doe v. Thomson*, 1841, 9 Dowl. 948.

⁶ *Id.*; *Swanne v. Taaffe*, 1845, 8 Ir. L. R. 101; *Milson v. Day*, 1829, 3 M. & P. 333.

⁷ *Chapman v. Davis*, 1841, 1 Dowl. (N.S.) 239.

⁸ *Page v. Carew*, 1831, 1 C. & J. 514.

⁹ 5 E. c. 9, § 12. Made perpetual by 26 & 27 V. c. 125. See *infra*, and also §§ 1247 et seq., as to what may be claimed for these.

any process of subpoena out of a Court of Record shall be served, and having tendered to him, according to his countenance or calling, such reasonable sum for his costs and charges, as, having regard to the distance of the places, is necessary to be allowed," shall, without lawful cause, neglect to appear, he shall *forfeit* 10*l.*, and yield such further recompense to the party aggrieved, as the judge in his discretion shall award. The question as to what constitutes the "*reasonable costs and charges*" of a witness under this statute was, in former times, left very much to the discretion of the taxing officers. It is now largely set at rest by the formal adoption of scales of remuneration.¹

§ 1246A. For in the various Divisions of the High Court there now are regular scales of allowances to witnesses.¹ The allowances to witnesses in bankruptcy proceedings are in the High Court the same as in other proceedings in the High Court; in the County Courts such allowances are in accordance with the scale for the time being in force in County Courts.² Such witnesses have a statutory right to the payment of expenses similar to the above.³ But⁴ a petitioning creditor is not regarded as a witness, or to be paid for loss of time, though he may claim his expenses of travelling and subsistence, and the position of a judgment debtor ordered to attend and be examined as to his means is the same.⁵

§ 1246B. There are also scales of allowances to witnesses in criminal cases at quarter sessions or assizes.⁶ The scale of remuneration in courts for the trial of either parliamentary or municipal petitions is by statute⁷ the same as in the High Court. In the

¹ For these the reader is referred to the various practice books. The scale applicable to the C. D. and K. B. D., and which was issued so long ago as 1853 will be found at pp. 218-19, vol. 2 of the *Annual Practice* for 1905. In consequence, however, of the provisions of Ord. 65, r. 27 (9), the scale is no longer binding in either the K. B. D. (*Turnbull v. Janson*, 1878, 8 C. P. D. 264) or the C. D. (*East Stonehouse Local Board v. Victoria Brewery Co.* [1895] 2 Ch. 514), and in practice a somewhat more liberal scale of allowance is usually adopted.

² General Regulations in Bankruptcy, No. 20.

³ *Chamberlain v. Stoneham*, 1889, 61 L. T. 560.

⁴ Bankruptcy Rules, 1886 and 1890, r. 71; *Williams' Bankruptcy*, p. 386.

⁵ *Rendell v. Grundy*, [1895] 1 Q. B. 16.

⁶ The scale now in operation was issued by Sir G. Grey in 1858. This and a few minor additions made by subsequent Home Secretaries will be found set out in *Archbold Criminal Prac.*, pp. 226-33.

⁷ 31 & 32 V. c. 125 ("The Parliamentary Elections Act, 1868"), § 34, amended by 42 & 43 V. c. 75, and 46 & 47 V. c. 51; continued till 31st December, 1905, by 4 Ed. 7, c. 29.

§§ 1246b County Court witnesses are somewhat less liberally remunerated
—1248. than in the Royal Courts of Justice.¹

§ 1247. The taxing officers will be justified,² under special circumstances, in allowing costs for the attendance of witnesses who have not been subpoenaed, or for the detention of witnesses beyond the actual period of the trial, or for services rendered by skilled witnesses, who either prior to the trial have been employed under the direction of the court,³ or at the trial have been retained to watch the testimony of other witnesses.⁴ In the High Court, too a rule⁵ now provides that, "as to evidence, such just and reasonable charges and expenses as appear to have been properly incurred in procuring evidence, and the attendance of witnesses, are to be allowed." Under this rule, a taxing officer may, in his discretion, allow to *scientific* witnesses for their attendance larger sums than can be awarded to ordinary witnesses under the general scale of allowances.⁶ Moreover, the term "*procuring evidence*," includes all preliminary costs incurred in *qualifying* witnesses to give evidence at the trial.⁷

§ 1248. In the High Court, if a foreign witness, not accessible by subpoena, whose evidence is material in the cause, refuses to leave his home unless remunerated for his trouble, the compensation paid to him, if reasonable in amount, will generally be allowed and taxed against the losing party.⁸ And where the captain of a ship has been detained for a long time in this country in order to give evidence on a trial, a large sum, such as £100 in

On its construction, see *McLaren v. Home*, 1881, 7 Q. B. D. 477.

¹ As to expenses of witnesses in County Courts, see C. C. R. of 1903, Ord. LIII. rr. 37—44 and schedule in Part 4 of Appendix thereto.

² See *D. of Beaufort v. Ld. Ashburnham*, 1863, 32 L. J. C. P. 97; *Churton v. Frewen*, 1867, 36 L. J. Ch. 660.

³ *Robb v. Connor*, 1874, Ir. R. 9 Eq. 373.

⁴ *Ryan v. Dolan*, 1872, Ir. R. 7 Eq. 92.

⁵ R. S. C. 1883, Ord. LXV. r. 27, sub-s. 9. This rule rejects the old practice of the Common Law Court, as laid down in *Nolan v. Copeman*, 1873, L. R. 8 Q. B. 84; *May v.*

Selby, 1842, 11 L. J. C. P. 223; *Murphy v. Nolan*, 1873, Ir. R. 7 Eq. 498; and adopts that formerly prevailing in Chancery, as shown by *Batley v. Kynock*, 1875, L. R. 20 Eq. 632; *Smith v. Buller*, 1875, L. R. 19 Eq. 473.

⁶ *Turnbull v. Janson*, 1878, 3 C. P. D. 264.

⁷ *Mackley v. Chillingworth*, 1877, 2 C. P. D. 273; *Turnbull v. Janson*, 1878, 3 C. P. D. 264. In Ireland the expenses of experts cannot be allowed at a rate exceeding the scale relating thereto: *Maconchy v. Bank of New Zealand*, [1900] 1 Ir. R. 22.

⁸ *Loneragan v. Roy. Ex. Ass.*, 1831, 7 Bing. 725; *Tremain v. Barrett*, 1815, 6 Taunt. 88.

all, may be allowed for his detention.¹ In that court, under very special circumstances, on taxation of costs, subsistence money has been allowed to a seafaring man, who was a necessary witness in his own cause, and who, after having obtained a verdict, remained in England until an application for a new trial, made by his opponent had been refused.² But where no special circumstances intervene, the expenses of the attendance of witnesses on the commission day of the assizes will not be allowed as against the losing party on taxation of costs.³ In the County Courts, special provision is made for an allowance to seafaring men, &c., detained on shore.⁴

§§ 1248,
1249.

§ 1249. The reasonable expenses of a witness ought to be tendered to him at the time when he is served with the subpoena,⁵ or, at least, a reasonable time before the trial;⁶ and even though he actually appears, he cannot be attached for declining to give evidence, unless these charges are paid or tendered.⁷ These expenses now include a reasonable remuneration for loss of time.⁸ He has, however, no right to refuse to be examined on the ground that the expenses incurred by him on former attendances have not been paid.⁹ If the witness be a married woman, the tender should be to her, rather than to her husband.¹⁰ If a person be subpoenaed by both parties, before giving evidence he is entitled to be paid by the party actually calling him all the expenses to which he will be liable, after exhausting what he may have received from the opposite side.¹¹ Of course a witness may waive

¹ As much as a guinea a day, and a total of over 100*l.*, has been allowed. See *Stewart v. Steele*, 1842, 11 L. J. C. P. 155; *Mount v. Larkins*, 1832, 8 Bing. 108; *Temperley v. Scott*, 1832, 8 Bing. 392; *Potter v. Rankin*, 1870, L. R. 5 C. P. 518; *Evans v. Watson*, 1846, 15 L. J. C. P. 256; *Berry v. Pratt*, 1823, 1 B. & C. 276. See *The Bahia*, 1865, L. R. 1 A. & E. 15; *The Karla*, 1864, B. & Lush. Adm. 367.

² *Dowdell v. Austral. Roy. Mail Co.*, 1854, 23 L. J. Q. B. 369. See *Howes v. Barber*, 1852, 21 L. J. Q. B. 254; *Calvert v. Scinde Rail. Co.*, 1865, 18 C. B. (N.S.) 306.

³ *Harvey v. Divers*, 1855, 16 C. B. 497.

⁴ C. C. R. 1903, Ord. LIII., r. 32.

⁵ *Fuller v. Prentice*, 1788, 1 H. Bl. 49.

⁶ *Horne v. Smith*, 1815, 6 Taunt. 9.

⁷ *Bowles v. Johnson*, 1748, 1 W. Bl. 36; *Newton v. Harland*, 1840, 1 M. & Gr. 956; *Brocas v. Lloyd*, 1857, 23 Beav. 129.

⁸ *Working Men's Mutual Soc.*, In re, 1882, 21 Ch. D. 831; *Chamberlain v. Stoneham*, 1889, 24 Q. B. D. 113. As to scale of allowances to witnesses, see Appendix, post.

⁹ *Gaunt v. Johnson*, 1848, 6 Beav. 551.

¹⁰ *Goodwin v. West*, 1637, as reported Cro. Car. 522; W. Jon. 430.

¹¹ *Allen v. Yoxall*, 1844, 1 C. & Kir. 315 (Rolfe, B.); *Betteley v. McLeod*, 1837, 6 L. J. C. P. 111.

§§ 1249,
1250.

his right to demand the payment of his expenses, and if he does so, either directly, by agreeing to take a less sum than that to which he is entitled,¹ or indirectly, by accompanying the parties to the place of trial without previously making any claim,² he will be liable to all the consequences of disobedience, should he subsequently refuse to appear as a witness.³

§ 1250. The law is not very clear as to the right of a witness who has attended a trial in a civil cause in obedience to a subpoena to recover in an action for his expenses and loss of time. It was formerly considered that expenses only could be recovered, and these only if either an express contract had been made,⁴ or if a contract to pay was inferred by the jury from the fact of attendance at the trial.⁵ Remuneration for loss of time was considered not to be recoverable on the ground that a witness was bound to attend upon the subpoena and that there was therefore no consideration for any promise to pay remuneration.⁶ The effect, however, of the Common Law Procedure Act, 1852, and the directions of the judges thereunder as to the scale of allowances to witnesses, and of the present Rules of the Supreme Court, is to recognise the right of witnesses, in certain cases, to remuneration for loss of time; and in several cases⁷ professional men have been held entitled to recover by action the remuneration provided for by the scale. It is submitted therefore that under the present law a witness subpoenaed in a civil cause may recover from the person on whose behalf he was subpoenaed, not only his bare expenses, but such remuneration as is provided for by the scale.⁸ No action lies by the witness against the solicitor who subpoenaed him, unless the solicitor has made himself personally liable by

¹ *Betteley v. M'Leod*, 1837, 6 L. J. C. P. 111.

² In *Newton v. Harland*, 1840, 1 M. & Gr. 956, a witness who accompanied the plaintiffs to the place of trial, and lived with them there, was deemed to have waived her right to remuneration up to the time of the trial, but to be still entitled to claim her fair expenses for returning home.

³ *Goodwin v. West*, 1637, Cro. Car. 522.

⁴ *Hallet v. Mears*, 1810, 13 East, 15; *Goodwin v. West*, 1637, Cro.

Car. 522.

⁵ *Pell v. Daubeney*, 1850, 20 L. J. Ex. 44.

⁶ *Willis v. Peckham*, 1820, 1 B. & B. 515; *Collins v. Godefroy*, 1831, 1 B. & Ad. 950.

⁷ *Hale v. Bates*, 1858, El. Bl. & El. 575; *Chamberlain v. Stoneham*, 1889, 24 Q. B. D. 113, and see *Working Men's Mutual Soc.*, In re, 1882, 21 Ch. D. 831.

⁸ As to scale of allowances to witnesses, see Appendix, post.

express contract.¹ An expert witness called to depose to a matter of opinion is, and has always been,² entitled to payment for his services; and the amount of his remuneration depends upon the special contract between himself and the person on whose behalf he is called.

§§ 1250—
1253.

§ 1251. Conduct-money received by a witness with a subpoena, may be recovered back by the party who paid it, as money had and received, where the attendance of the witness has become unnecessary, and no expenses have been incurred under the writ.³

§ 1252.⁴ In *criminal cases* it is not in general necessary that there should be any *tender of fees*, either on the part of the Crown or of a prisoner, to compel the attendance of the respective witnesses.⁵ This rule will prevail, though the indictment has been removed by certiorari, and is, consequently, tried in the Nisi Prius Court.⁶ An exception exists, however, in favour of witnesses, who, living in one distinct part of the United Kingdom, are required to obey subpoenas directing their attendance in another; for these are not liable to punishment for disobedience of the process, unless, at the time of service, a reasonable and sufficient sum of money, to defray their expenses in coming, attending, and returning, has been tendered to them.⁷ And although the Army Act, 1881,⁸ contains no positive enactment enforcing the payment of fees to a witness attending a court martial, such a witness cannot be punished for making default in his attendance, unless previously to the trial he was paid or tendered his reasonable expenses.

§ 1253. In criminal cases the right to costs rests in every case on statute. There is no general provision enabling a court to award costs in favour of prosecutor or defendant in a prosecution for an indictable offence. In order to encourage the due prosecution of offenders, criminal courts have power to grant to those

¹ *Robins v. Bridge*, 1837, 3 M. & W. 114; *Lee v. Everest*, 1857, 26 L. J. Ex. 334.

² *Webb v. Page*, 1843, 1 Car. & K. 23.

³ *Martin v. Andrews*, 1856, 26 L. J. Q. B. 39.

⁴ Gr. Ev. § 311, as to first three lines.

⁵ *Pell v. Daubeney*, 1850, 20 L. J.

Ex. 44; *R. v. Cousens*, 1850, 3 Russ. C. & M. 599; *R. v. Cooke*, 1824, 1 C. & P. 322.

⁶ *R. v. Cooke*, 1824, 1 C. & P. 322. See post, § 1256.

⁷ 45 G. 3, c. 92, § 4. See, also, 44 & 45 V. c. 24, § 4, sub-s. 3; and 44 & 45 V. c. 69, §§ 15 and 27.

⁸ 44 & 45 V. c. 58, § 126, sub-s. 1a.

§ 1253. prosecutors and witnesses for the Crown who attend on recognisance¹ or subpoena,² such costs as will reimburse them for the expenses they have incurred, or shall incur,³ in all cases of felony,⁴ save one or two.⁵

¹ A party will be entitled to his expenses under this term, though he has been bound over to prosecute by the Quarter Sessions: *R. v. Paine*, 1834, 7 C. & P. 136.

² The expenses of a prosecutor, whose name is included in a subpoena, are not confined, under this term, to his costs as a witness only, though he has not been bound over by the magistrate to prosecute: *R. v. Sheering*, 1836, 7 C. & P. 440 (by all the judges). See *R. v. Jeyes*, 1835, 3 A. & E. 416.

³ A judge reserving a case for the C. C. C. R. may allow the prosecutor the costs he will incur in arguing such case; and the officer of the court above will tax and ascertain such costs, and certify the amount to the officer of the court below: *R. v. Lewis*, 1857, Dears. & B. 326; *R. v. Cludero*, 1849, 3 C. & K. 205.

⁴ By 7 G. 4. c. 64 ("The Criminal Law Act, 1826"), § 22, "the court before which any person shall be prosecuted or tried for any felony is hereby authorised and empowered, at the request of the prosecutor or of any other person, who shall appear on recognisance or subpoena to prosecute or give evidence against any person accused of any felony, to order payment unto the prosecutor of the costs and expenses which such prosecutor shall incur in preferring the indictment, and also payment to the prosecutor and witnesses for the prosecution, of such sums of money as to the court shall seem reasonable and sufficient, to reimburse such prosecutor and witnesses for the expenses they shall have severally incurred in attending before the examining magistrate or magistrates and the grand jury, and in otherwise carrying on such prosecution; and also to compensate them for their trouble and loss of time therein; and, although no bill of indictment be preferred, it shall still be lawful for the court, where any person

shall, in the opinion of the court, bonâ fide have attended the court in obedience to any such recognisance or subpoena, to order payment unto such person of such sum of money as to the court shall seem reasonable and sufficient, to reimburse such person for the expenses which he or she shall have bonâ fide incurred by reason of attending before the examining magistrate or magistrates, and by reason of such recognisance or subpoena; and also to compensate such person for trouble and loss of time; and the amount of the expenses of attending before the examining magistrate or magistrates, and the compensation for trouble and loss of time therein, shall be ascertained by the certificate of such magistrate or magistrates, granted before the trial or attendance in court, if such magistrate or magistrates shall think fit to grant the same; and the amount of all other expenses and compensation shall be ascertained by the proper officer of the court, subject nevertheless to the regulations to be established in the manner hereinafter mentioned." As to Ireland, see 6 & 7 W. 4, c. 116 ("The Grand Jury (Ireland) Act, 1836"), § 105, Ir.; and 7 & 8 V. c. 106 ("The County Dublin Grand Jury Act, 1844"), § 40, Ir.

⁵ The chief exceptions appear to be in the case of offences against "The Treason Felony Act, 1848" (11 & 12 V. c. 12), § 10, and prosecutions, not conducted by the Crown, and successful in obtaining a conviction for offences against the coinage, under 24 & 25 V. c. 99 ("The Coinage Offences Act, 1861"), by § 42 of which "in all prosecutions for any offence against this Act, in England, which shall be conducted under the direction of the solicitors of Her Majesty's Treasury, the court . . . shall allow the expenses of the prosecutors, in all respects as in cases of felony; and in all prosecutions for any such offence, in England, which shall not

§ 1254. Similar powers of awarding costs are also possessed by the court on prosecutions for any of the following *misdemeanors or offences*:—attempts to commit felony;¹ assaults with intent to commit felony;² assaults upon a peace officer in the execution of his duty, or upon any person acting in his aid;³ assaults in pursuance of any conspiracy to raise the rate of wages;⁴ the receiving stolen property knowing it to have been stolen;⁵ riot;⁶ perjury;⁷ subornation of perjury;⁸ neglect or breach of duty as

be so conducted, it shall be *lawful* for such court, in case a conviction shall take place, but not otherwise, to allow such expenses."

¹ By 7 G. 4, c. 64 ("The Criminal Law Act, 1826"), § 23, "where any prosecutor or other person shall appear before any court, on recognisance or subpoena, to prosecute or give evidence against any person indicted of any assault with intent to commit felony, of any attempt to commit felony, of any riot, of any misdemeanor for receiving any stolen property knowing the same to have been stolen, of any assault upon a peace officer in the execution of his duty, or upon any person acting in aid of such officer, of any neglect or breach of duty as a peace officer, of any assault committed in pursuance of any conspiracy to raise the rate of wages, of knowingly and designedly obtaining any property by false pretences, of wilful and indecent exposure of the person, of wilful and corrupt perjury, or of subornation of perjury, every such court is hereby authorised and empowered to order payment of the costs and expenses of the prosecutor and witnesses for the prosecution, together with a compensation for their trouble and loss of time, in the same manner as courts are hereinbefore authorised and empowered to order the same in cases of felony; and, although no bill of indictment be preferred, it shall still be lawful for the court, where any person shall have *bonâ fide* attended the court in obedience to any such recognisance, to order payment of the expenses of any such person, together with a compensation for his or her trouble and loss of time, in the same manner

as in cases of felony." A proviso originally contained in this section, excluding expenses of attendance before the examining magistrate from its operation, is repealed by § 1 of 14 & 15 V. c. 55 ("The Criminal Justice Administration Act, 1851"). By §§ 24 & 25 of 7 G. 4, c. 64 ("The Criminal Law Act, 1826"), the order for payment is to be made out by the proper officer of the court, and the money is to be paid by the treasurer of the county, &c., or by such other person as is mentioned in the Act. If the treasurer refuses to pay the expenses in obedience to the order, the remedy is by indictment, and not by mandamus: *R. v. Jeyes*, 1835, 3 A. & E. 416. See 5 A. & E. 812, n. But to render the treasurer liable to prosecution, the entire order of the court must be served upon him: *R. v. Jones*, 1840, 9 C. & P. 260. § 27 of the Act provides for the payment of the expenses of prosecutions in the Court of Admiralty. By 4 & 5 W. 4, c. 36 ("The Central Criminal Court Act, 1834"), § 12, any two judges of the Central Criminal Court may order the costs of prosecutors and witnesses to be paid by the treasurer of the county in which, but for that Act, the offender would have been tried. See 7 & 8 V. c. 106 ("The County Dublin Grand Jury Act, 1844"), § 40, *Ir.*, as to what remuneration will be allowed to prosecutors and witnesses attending the trial of misdemeanors in the county of Dublin.

² 7 G. 4, c. 64, § 23, cited in last note.

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

§ 1254. a peace officer ; ¹ obtaining property by false pretences ; ² wilful and indecent exposure of the person ; ³ endeavouring to conceal the birth of a child ; ⁴ the felony of having or attempting to have carnal knowledge of girls under thirteen years of age ; ⁵ the misdemeanor of having or attempting to have carnal knowledge of a girl over thirteen and under sixteen, and other offences against the Criminal Law Amendment Act ; ⁶ taking or causing to be taken any unmarried girl under the age of sixteen years from her father, mother, or guardian ; ⁷ conspiring to charge any person with felony, or to indict him for felony ; ⁸ conspiring to commit any felony ; ⁹ committing any corrupt practice, whether it be a felony, or misdemeanor, either at a parliamentary ¹⁰ or at a municipal ¹¹ election, and all misdemeanors under the Merchant Shipping Act, 1894 ; ¹² on trials on indictment under the Prevention of Cruelty to Children Act, 1904, ¹³ under the Prevention of Offences Act, 1851, ¹⁴ or under any of the Acts of 1861, relating to larcenies, to malicious injuries to property, to forgery, or to offences against the person. ¹⁵ On any prosecution on indictment

¹ 7 G. 4, c. 64 ("The Criminal Law Act, 1826"), § 23, cited ante, note ¹, p. 899.

² Id.

³ Id.

⁴ 7 W. 4 & 1 V. c. 44.

⁵ See 7 G. 4, c. 64 ("The Criminal Law Act, 1826"), ante, § 1253.

⁶ By 48 & 49 V. c. 69 ("The Criminal Law Amendment Act, 1885"), § 18, "The court before which a misdemeanor indictable under this Act, or any case of indecent assault, shall be prosecuted or tried may allow the costs of the prosecution in the same manner as in cases of felony, and may in like manner on conviction order payment of such costs by the person convicted; and every order for the allowance or payment of such costs shall be made out, and the sum of money mentioned therein paid and repaid upon the same terms and in the same manner in all respects as in cases of felony."

⁷ 14 & 15 V. c. 55 ("The Criminal Justice Administration Act, 1851"), § 2. And see, also, 48 & 49 V. c. 69 ("The Criminal Law Amendment Act, 1885"), § 10.

⁸ 14 & 15 V. c. 55, § 2.

⁹ Id.

¹⁰ 46 & 47 V. c. 51 ("The Corrupt and Illegal Practices Prevention Act, 1883"), § 53, embodying §§ 10 and 13 of 17 & 18 V. c. 102 ("The Corrupt Practices Prevention Act, 1854"), and applied to prosecutions under 47 & 48 V. c. 70 ("The Municipal Elections (Corrupt and Illegal Practices) Act, 1884"), by § 30 of latter Act, and continued till 31st December, 1905, by "The Expiring Laws Continuance Act, 1904" (4 Ed. 7, c. 29).

¹¹ See 47 & 48 V. c. 70 ("The Municipal Elections (Corrupt and Illegal Practices) Act, 1884"), § 30, incorporating 17 & 18 V. c. 102 ("The Corrupt Practices Prevention Act, 1854"), § 10, and continued till 31st December, 1895, by "The Expiring Laws Continuance Act, 1894" (57 & 58 V. c. 48).

¹² 57 & 58 V. c. 60, §§ 680 (1), 682, and 700.

¹³ 4 Ed. 7, c. 15, § 20.

¹⁴ 14 & 15 V. c. 19, § 14.

¹⁵ 24 & 25 V. c. 96 ("The Larceny Act, 1861"), § 121; 24 & 25 V. c. 97 ("The Malicious Damage Act, 1861"), § 77; 24 & 25 V. c. 98 ("The Forgery Act, 1861"), § 54;

under section 2 of the Inebriates Act, 1898,¹ and in all cases where the offence being summarily punishable is tried on indictment at the election of the accused.² §§ 1254—1256a.

§ 1255. If a bankrupt be prosecuted by order of any court, for any misdemeanor under the Debtors Act, 1869, or the Bankruptcy Act, 1883, the costs of the prosecution will only be allowed on production of an order from the court.³

§ 1256. The Acts, which authorise the awarding of costs to prosecutors and witnesses for the Crown in criminal trials, do not apply to cases where the indictment has been removed into the King's Bench Division of the High Court by certiorari;⁴ and no distinction in this respect is recognised between a removal by the prosecutor and a removal by the defendant.⁵

§ 1256A. Where the Acts apply, all extra expenses incurred in getting up a prosecution may be reimbursed, *except* the attendance of witnesses before a coroner.⁶ Thus, where a witness, in consequence of being taken ill during his attendance at the trial, was put to some extra charges, these have been awarded to him;⁷ and the costs of an argument before the Court for Crown Cases Reserved may be allowed.⁸ Expenses may also be allowed to the prosecutor and his witnesses,⁹ though the accused, who had not been apprehended, and was under no recognisance, did not appear to take his trial:¹⁰ or though the prisoner had been apprehended under a bench-warrant, and the prosecutor and his witnesses were under no recognisances, and only one of them had been

24 & 25 V. c. 100 ("The Offences against the Person Act, 1861"), § 77.

¹ 61 & 62 V. c. 60, see 62 & 63 V. c. 85 ("The Inebriates Act, 1899"), § 1.

² 42 & 43 V. c. 49 ("The Summary Jurisdiction Act, 1879"), § 17 (1).

³ 32 & 33 V. c. 62 ("The Debtors Act, 1869"), § 17; 46 & 47 V. c. 52, § 149, sub-sect. 2, and § 166; 35 & 36 V. c. 57, § 17, *Ir.*; *R. v. Thomas*, 1870, 11 Cox, C. C. 535. See *Ex parte Berry*, 1812, 19 Ves. 218.

⁴ *R. v. Kelsey*, 1832, 1 Dowl. 481; *R. v. Richards*, 1828, 8 B. & C. 420; *R. v. Johnson*, 1827, 1 Moody, C. C. 173; *R. v. Jeyes*, 1835, 3 A. & E. 416, 419. See *ante*, § 1252.

⁵ *R. v. Treasurer of Exeter*, 1829, 5 M. & R. 167 (Littledale, J.), *sed qu.*; and see *R. v. —*, 1838, 3 N. & P. 627.

⁶ *R. v. Lewen*, 1836, 2 Lewin, C. C. 161; *R. v. Rees*, 1832, 5 C. & P. 302; *R. v. Taylor*, 1832, 5 C. & P. 301.

⁷ *In re Mallison*, 1832, 1 Lewin, C. C. 132; *Anon.*, 1833, 1 Lewin, C. C. 133 (Parke, J.).

⁸ *R. v. Cluderoy*, 1849, 3 C. & K. 205; *R. v. Lewis*, 1857, Dears. & B. 326. See *ante*, § 1253, n.

⁹ *Anon.*, 1833, 1 Lewin, C. C. 133 (Hullock, B.).

¹⁰ *Flannery's case*, 1832, 1 Lewin, C. C. 133; *Anon.*, 1833, 1 Lewin, C. C. 134 (Gurney, B.).

§§ 1256a subpœnaed; ¹ or though the accused was not forthcoming, having
 —1257a. been (through some mistake) discharged by proclamation at a preceding sessions, ² or did not reach the town till the grand jury were discharged. ³

§ 1257. In August, 1851, the Home Secretary was authorised to make regulations as to the amount of costs to be allowed to prosecutors and their witnesses in the criminal cases above stated; ⁴ and rules on this subject were promulgated on the 9th of February, 1858. ⁵

§ 1257A. By the Act to abolish forfeitures for treason and felony, ⁶ upon the conviction of any person for treason or felony, the court has power to condemn such person to the payment of the whole or any part of the costs or expenses incurred in or about such prosecution and conviction. In some grave cases of felony the court has power ⁷ to order that persons who have been

¹ *R. v. Butterwick*, 1839, 2 M. & Rob. 196.

² *R. v. Robey*, 1833, 5 C. & P. 552. In this case the witnesses had been bound over to appear, and a true bill had been actually found.

³ *Anon.*, 1833, 1 Lewin, C. C. 128 (*Hullock, B.*).

⁴ 14 & 15 V. c. 55 ("The Criminal Justice Administration Act, 1851"), §§ 4, 5, 6, repealing 7 Geo. 4, c. 64 ("The Criminal Law Act, 1826"), § 26.

⁵ The scale established by these rules will be found in the Appendix.

⁶ 33 & 34 V. c. 23, § 3.

⁷ Under 7 G. 4, c. 64 ("The Criminal Law Act, 1826"), § 28, which enacts that, "where any person shall appear to any court of oyer and terminer, gaol delivery, superior criminal court of a county palatine, or court of great sessions, to have been active in or towards the apprehension of any person charged with murder or with feloniously and maliciously shooting at, or attempting to discharge any kind of loaded firearms at, any other person, or with stabbing, cutting, or poisoning, or with administering anything to procure the miscarriage of any woman, or with rape, or with burglary or felonious housebreaking, or with robbery on the person, or with arson, or with horse-stealing, bullock-stealing, or sheep-

stealing, or with being accessory before the fact to any of the offences aforesaid, or with receiving any stolen property knowing the same to have been stolen, every such court is hereby authorised and empowered, in any of the cases aforesaid, to order the sheriff of the county in which the offence shall have been committed, to pay to the person or persons who shall appear to the court to have been active in or towards the apprehension of any person charged with any of the said offences, such sum or sums of money as to the court shall seem reasonable and sufficient to compensate such person or persons for his, her, or their expenses, exertions, and loss of time in or towards such apprehension; and where any person shall appear to any court of sessions of the peace to have been active in or towards the apprehension of any party, charged with receiving stolen property knowing the same to have been stolen, such court shall have the power to order compensation to such person in the same manner as the other courts hereinbefore mentioned; provided always, that nothing herein contained shall prevent any of the said courts from also allowing to any such persons, if prosecutors or witnesses, such costs, expenses, and compensation, as courts are by this Act empowered to allow to prose-

especially active in apprehending the accused, shall be paid some additional remuneration for their expenses,¹ exertions,² and loss of time. This power exists in cases of murder;³ attempting to murder;⁴ stabbing, cutting, or poisoning;⁵ shooting at any one, or attempting to discharge loaded firearms at him;⁶ administering anything to a woman to procure her miscarriage;⁷ rape;⁸ house-breaking;⁹ robbery;¹⁰ arson;¹¹ horse-stealing;¹² bullock-stealing;¹³ or sheep-stealing;¹⁴ and receiving stolen property knowing it to have been stolen;¹⁵—and may be exercised by courts either of oyer and terminer and gaol delivery, or by sessions of the peace.¹⁶

cutors and witnesses respectively.”

§ 29 provides that the sheriff shall pay the amount awarded, and shall be repaid by Her Majesty's Treasury; and § 30 enacts, that if any man shall be killed in endeavouring to apprehend any person charged with any of the offences mentioned in § 28, the court may order the sheriff to pay to his widow, child, father, or mother such sum as in its discretion shall seem meet. It is provided by 14 & 15 V. c. 55 (“The Criminal Justice Administration Act, 1851”), § 7, that “nothing in this Act or in any regulations under this Act, shall interfere with or affect the power of any court to order payment to any person who may appear to such court to have shown extraordinary courage, diligence, or exertion, in, or towards any such apprehension as hereinbefore mentioned, of such sum as such court shall think reasonable, and adjudge to be paid, in respect of such extraordinary courage, diligence, or exertion.”

¹ This does not include expenses incurred in apprehending a prisoner out of England: *R. v. Barrett*, 1852, 6 Cox, C. C. 78. But the Secretary of State must in such case be memorialised: *Id.*

² Under this word, a gratuity may be awarded to a prosecutor for his courage in apprehending the prisoner: *R. v. Womersley*, 1836, 2 Lewin, C. C. 162 (Parke, B.), though he has not been put to any expense; *R. v. Barnes*, 1835, 7 C. & P. 166. If the facts do not appear in evidence, the judge will require them to be laid before him on affidavit:

R. v. Jones, 1834, 7 C. & P. 167.

³ 7 G. 4, c. 64 (“The Criminal Law Act, 1826”), cited in note on last page.

⁴ This offence, though not mentioned in the statute, is within the spirit of the enactment, and extra expenses incurred in apprehending a prisoner charged with attempting to murder have been allowed: *R. v. Durkin*, 1837, 2 Lewin, C. C. 163.

⁵ 7 G. 4, c. 64, § 28, cited in note on last page.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.* This seems not to include sacrilege: *R. v. Robinson*, 1828, 1 Lewin, C. C. 129 (Hullock, Bolland, and Parke, BB.).

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.* This word describes a *class* of offences, and includes the crime of stealing cows, heifers, &c.: *R. v. Gillbrass*, 1836, 7 C. & P. 444.

¹⁴ *Id.*

¹⁵ *Id.* See, also, 5 G. 4, c. 84 (“The Transportation Act, 1824”), § 22, on the construction of which see *R. v. Emmons*, 1840, 2 M. & Rob. 279; *R. v. Ambury*, 1852, 6 Cox, C. C. 79. See the Irish Acts of 6 & 7 W. 4, c. 116 (“The Grand Jury (Ireland) Act, 1836”), §§ 106, 107: and 7 & 8 V. c. 106 (“The County Dublin Grand Jury Act, 1844”), §§ 41, 42.

¹⁶ 14 & 15 V. c. 55 (“The Criminal Justice Administration Act, 1851”), § 8, enacts that, “when any person appears to any court of sessions of the peace to have been active in or towards the apprehension of any party charged with any of the offences in the said enactment men-

§§ 1258-9
-1260.

§§ 1258-9. An Act¹ which is still in form only temporary, but which has now been in operation for nearly thirty years and is still in force,² empowers magistrates, on all charges of felony "bonâ fide made upon reasonable and probable cause," or on a charge of any misdemeanor, bonâ fide preferred, in which they possess a general power to allow costs,³ to grant to prosecutors and witnesses certificates of their expenses, and of their allowances for trouble and loss of time, although they may not be bound over by recognisance or subpœna to prosecute or give evidence, and although no committal for trial may take place. The Court of Quarter Sessions is then empowered to allow the amount named in any such certificate, and to sign an order for payment.⁴ Again, the Summary Jurisdiction Act, 1879,⁵ which empowers justices in petty sessions to dispose of many indictable offences in a summary way, provides, in § 28, that, subject to the Home Office regulations, such justices may, if they think fit, order payment of the expenses of the prosecutors and witnesses.

§ 1260. By the common law, alike in England and in America, in all criminal cases, the prisoner is entitled to have compulsory process for obtaining witnesses in his favour.⁶ In England, by an Act known as "Russell Gurney's Act," and passed in 1867, the court, before which any accused person is tried either for felony or misdemeanor, may order that any of his witnesses, who shall appear on recognisance, shall be paid such sum as

tioned" (that is, in § 28 of 7 G. 4, c. 64) "which such sessions may have power to try, such court of sessions shall have power to order compensation to be paid to such person in the same manner as the other courts in the said enactment mentioned; provided that such compensation to any one person shall not exceed the sum of five pounds, and that every order for payment to any person of such compensation, be made out and delivered by the proper officer of the court unto such person without fee or payment for the same."

¹ 29 & 30 V. c. 52.

² Being by "The Expiring Laws Continuance Act, 1904" (4 Ed. 7,

c. 29), § 1, and schedule, continued until 31st December, 1905.

³ Under any of the Acts already referred to.

⁴ 29 & 30 V. c. 52, § 2.

⁵ 42 & 43 V. c. 49.

⁶ 2 Hawk. P. C. c. 46, §§ 170, 172; 2 Ph. Ev. 434; 3 Russ. C. & M. 598; Const. U. S. Amendm. Art. 6. See, also, 30 & 31 V. c. 35, §§ 3 and 4, extending § 23 of 7 G. 4, c. 64 (set out ante, note to § 1254); § 2 of 14 & 15 V. c. 55 (set out *ibid.*), and 11 & 12 V. c. 42 ("The Indictable Offences Act, 1848"), §§ 16 and 20, to witnesses for a defendant, and itself extended to Scotland by 55 & 56 V. c. 55 ("The Burgh Police (Scotland) Act, 1892"), § 475.

will compensate them for the expenses, trouble, and loss of time they may have incurred in attending either before the magistrate or before the court.¹ By the same Act, on certain charges of misdemeanor,² which may form the subject of vexatious indictments, the court, in the event of the accused being acquitted may, under certain circumstances, order his costs, and the costs of his witnesses, to be defrayed by the prosecutor.³ § 1260.

¹ 30 & 31 V. c. 35, § 5, enacts that "the court before which any accused person shall be prosecuted or tried, or for trial before which he may be committed or bailed to appear for any felony or misdemeanor, is hereby authorised and empowered, in its discretion, at the request of any person who shall appear before such court on recognisance to give evidence on behalf of the person accused, to order payment unto such witness so appearing of such sum of money as to the court shall seem reasonable and sufficient to compensate such witness for the expenses, trouble, and loss of time he shall have incurred or sustained in attending before the examining magistrate, and at or before such court; and the amount of such expenses of attending before the examining magistrate, and compensation for trouble and loss of time therein, shall be ascertained by the certificate of such magistrate, granted before the attendance in court; and the amount of all other expenses and compensation shall be ascertained by the proper officer of the court, who shall, upon receipt of the sum of *sixpence* for each witness [but now, as to this fee, see 32 & 33 V. c. 89, §§ 10, 11], make out and deliver to the person entitled thereto an order for such expenses and compensation, together with the said fee of sixpence, upon such and the same treasurers and officers as would now by law be liable to payment of an order for the expenses of the prosecutor or witnesses against such accused person; and if the accusation be of such kind that the court shall have no power to order the expenses of the prosecutor, then upon the treasurer or other officer in the capacity of a treasurer of the county, riding, division, city, borough, or place where

the offence of such accused person may be alleged to have been committed, which treasurer or other officer is hereby required to pay the same orders upon sight thereof, and shall be allowed the same in his accounts: Provided always, that in no case shall any such allowances or compensation exceed the amount now by law permitted to be made to prosecutors and witnesses for the prosecution; and provided always, that such allowances and compensation shall be allowed and paid as part of the expenses of the prosecution."

² Viz.: perjury, subornation of perjury, conspiracy, obtaining money or other property by false pretences, keeping a gambling or disorderly house, and any indecent assault.

³ By 30 & 31 V. c. 35, § 2, "whenever any bill of indictment shall be preferred to any grand jury, under the provisions of 'The Vexatious Indictments Act, 1859' (22 & 23 V. c. 17)" [for any offence named in the last preceding note] "against any person who has not been committed to or detained in custody, or bound by recognisance to answer such indictment, and the person accused thereby shall be acquitted thereon, it shall be lawful for the court before which such indictment shall be tried, in its discretion, to direct and order that the prosecutor, or other person by or at whose instance such indictment shall have been preferred, shall pay unto the accused person the just and reasonable costs, charges, and expenses of such accused person and his witnesses (if any) caused or occasioned by or consequent upon the preferring of such bill of indictment, to be taxed by the proper officer of the court; and upon non-payment of such costs,

§§ 1260— A similar power also prevails with respect to certain other
1260b. misdemeanors.¹

§ 1260A. Independently of enactment, the court may, for the purposes of defence, direct constables to restore to prisoners any property which may have been taken from them, provided only that it be not required as an instrument of proof at the trial, and that it do not fairly appear to be the produce of the crime with which they stand charged.²

§ 1260B. The Poor Prisoners' Defence Act, 1903,³ provides that when a certificate for legal aid has been given under the Act, the expenses of the defence, including the cost of a copy of the depositions, the fees of solicitors and counsel, and the expenses of any witnesses shall be allowed and paid in the same manner as the expenses of a prosecution in cases of indictment for felony, subject however to any rules made under the Act and to any regulations as to rates or scales of payment which may be made by one of His Majesty's Principal Secretaries of State.

charges, and expenses within one calendar month after the date of such direction and order, it shall be lawful for" [the Queen's Bench Division of the High Court], "or any judge thereof, or for the justices and judges of the Central Criminal Court (if the bill of indictment has been preferred in that court), to issue against the person on whom such order is made such and the like writ or writs, process or processes, as may now be lawfully issued by any of the said superior courts for enforcing judgment thereof."

A defendant is liable to be ordered to pay the costs of the prosecution on conviction upon indictment of any assault, 24 & 25 V. c. 100, § 74.

By § 8 of *Ld. Campbell's Act*, 6 & 7 V. c. 96, in the case of any indictment or information by a private prosecutor for the publication of any defamatory libel if judgment shall be given for the defendant he shall be entitled to recover from the prosecutor the costs sustained by the said defendant by reason of such indictment or information, and upon a special plea of justification to such indictment or information if the issue be found for the prosecutor he shall

be entitled to recover from the defendant the costs sustained by the prosecutor by reason of such plea, such costs to be recovered by the defendant or prosecutor respectively, to be taxed by the proper officer of the court before whom such indictment or information is tried.

¹ Namely, misdemeanors under "The English Debtors Act, 1869" (32 & 33 V. c. 62, § 18); "The Bankruptcy Act, 1883" (46 & 47 V. c. 52, § 149, sub-a. 2); "The Irish Debtors Act, 1872" (35 & 36 V. c. 57, § 18, *Ir.*); "The Corrupt Practices Prevention Act, 1854" (17 & 18 V. c. 102, § 12, continued by 4 *Ed.* 7, c. 29, till 31st December, 1905), and probably "The Municipal Corporations Act, 1882, Part IV." (47 & 48 V. c. 70, § 30), and "The Newspaper Libel and Registration Act, 1881" (44 & 45 V. c. 60, § 6).

² *R. v. Barnett*, 1829, 3 C. & P. 600; *R. v. Jones*, 1834; *R. v. O'Donnell*, 1835, 7 C. & P. 138; *R. v. Kinsey*, 1836, 7 C. & P. 447; *R. v. Burgess*, 1836, 7 C. & P. 488; *R. v. Rooney*, 1836, 7 C. & P. 517; *R. v. Frost*, 1839, 9 C. & P. 131.

³ 3 *Ed.* 7, c. 38.

§ 1261. Writs of subpoena have at common law no force beyond the jurisdictional limits of the court from which they issue. To secure the due administration of justice, additional powers were required to compel the attendance of witnesses resident in one part of the United Kingdom at a trial in another part. In 1805, an Act was passed supplying a remedy for the evil, so far as regarded *criminal prosecutions*.¹

§§ 1261,
1262.

§ 1262. Nearly half a century later, the Attendance of Witnesses Act, 1854, provided means by which, in *civil cases*, the attendance of witnesses who are in one kingdom of the British Empire can be enforced in any other such kingdom.²

¹ 45 G. 3, c. 92, §§ 3, 4, which in substance enacts that the service of a subpoena or other process upon any person in one part of the United Kingdom, requiring his appearance to give evidence in any *criminal prosecution* in another part, shall be as effectual as if the process had been served in that part where the witness is required to appear. If the person served does not appear, the court out of which the process issued may, upon proof of service, transmit a certificate of the default, under the seal of the court, or under the hand of one of the judges, to the Queen's Bench Division of the High Court in England or Ireland, or to the Court of Justiciary in Scotland, according as the writ may have been served in one or other of these parts of the kingdom; and such courts respectively, on proof that a reasonable sum was tendered to the witness for his expenses, may punish him for his default, in like manner as if he had refused to appear in obedience to process issuing out of these respective courts.

² 17 & 18 V. c. 34 ("The Attendance of Witnesses Act, 1854"), in substance enacts, "I. If in any action or suit now or at any time hereafter depending in any Division of her Majesty's High Court of Justice" (these words must be read here by the Judicature Act, 1873 (36 & 37 V. c. 68)) "at Westminster or Dublin, or the Court of Session or Exchequer in Scotland, it shall appear to the court in which such action is pending, or if such court

is not sitting, to any judge of any of the said courts respectively, that it is proper" (the affidavit on which the application is founded, must disclose facts to show that the attendance of the witness is reasonably necessary: *Allen v. D. of Hamilton*, 1867, L. R. 2 C. P. 630) "to compel the personal attendance at any trial"—(this term will not include the hearing of an action, which "with all matters in difference" has been referred to an arbitrator: *Hall v. Brand*, 1883, 12 Q. B. D. 39 (C. A.). *Quære*, will it include the hearing of a claim in chambers: *Power v. Webber*, 1876, Ir. R. 10 Eq. 188; or a reference before a master: *O'Flanagan v. Geoghagan*, 1864, 12 Q. B. D. 39. See *Hall v. Brand*, *supra*, and see post, § 1308)—"of any witness, who may not be within the jurisdiction of the court in which such action is pending, it shall be lawful for such court or judge, if in his or their discretion it shall so seem fit, to order that a writ called a writ of subpoena ad testificandum, or of subpoena duces tecum, or warrant of citation, shall issue in special form commanding such witness to attend such trial wherever he shall be within the United Kingdom, and the service of any such writ or process in any part of the United Kingdom shall be as valid and effectual to all intents and purposes as if the same had been served within the jurisdiction of the court from which it issues. II. Every such writ shall have at the foot thereof a statement or notice that the same is issued by the special order of the

§§ 1262a
—1264.

§ 1262A. By the Judicature Act, 1884,¹ a judge may now exercise the powers thus given, whether a court be sitting or not.

§ 1263. The salutary powers conferred by the above enactments, ought to be extended to all important tribunals alike in criminal and civil cases.²

§ 1264. At all events, all inferior courts of record ought to be empowered to issue subpoenas into any part of England. At present, such courts can only, in general,³ serve them within

court or judge, as the case may be; and no such writ shall issue without such special order. III. In case any person so served shall not appear according to the exigency of such writ or process, it shall be lawful for the court out of which the same issued, upon proof made of the service thereof, and of such default, to the satisfaction of the said court, to transmit a certificate of such default, under the seal of the same court, or under the hand of one of the judges or justices of the same, to any of her Majesty's Superior Courts of Common Law at Westminster, in case such service was had in England, or, in case such service was had in Scotland, to the Court of Session or Exchequer at Edinburgh, or, in case such service was had in Ireland, to any of her Majesty's Superior Courts of Common Law at Dublin; and the court to which such certificate is so sent, shall and may thereupon proceed against and punish the person so having made default, in like manner as they might have done if such person had neglected or refused to appear in obedience to a writ of subpoena or other process issued out of such last-mentioned court. IV. None of the said courts shall in any case proceed against or punish any person, for having made default by not appearing to give evidence in obedience to any writ of subpoena or other process issued under the powers given by this Act, unless it shall be made to appear to such court, that a reasonable and sufficient sum of money to defray the expenses of coming and attending to give evidence, and of returning from giving such evidence, had been tendered to such person at the time when such writ of subpoena

or process was served upon such person. V. Nothing herein contained shall alter or affect the power of any of such courts to issue a commission for the examination of witnesses out of their jurisdiction, in any case in which, notwithstanding this Act, they shall think fit to issue such commission. VI. Nothing herein contained shall alter or affect the admissibility of any evidence at any trial, where such evidence is now by law receivable, on the ground of any witness being beyond the jurisdiction of the court, but the admissibility of all such evidence shall be determined as if this Act had not passed." In addition to the power of ordering the *attendance* of witnesses who are in another part of the United Kingdom, which is conferred by the above enactment, there also is power to order their *examination* on commission and their attendance before the commissioners; see *infra*, § 1312.

¹ 47 & 48 V. c. 61, § 16, and 40 & 41 V. c. 57, § 21, *Ir.*

² As to the details of practice now rendering such extension desirable, and of the manner in which it should be effected, see *infra*, § 1268. In the counties bordering on Scotland, the want of such a power is much felt in the County Courts. In the United States, courts sitting in any district are empowered by statute to send subpoenas for witnesses into any other district, provided that, in civil causes, the witness do not live at a greater distance than one hundred miles from the place of trial: Stat. 1793, ch. 66 [22], § 6; 1 L. L., U. S. p. 312, Story's ed.

³ See post, § 1291, as to the County Courts.

their own jurisdiction. Subpœnas, therefore, which are granted by the clerk of assize or clerk of the peace are not compulsory except within a single county or other more limited district: and the consequence is, that if a necessary but unwilling witness happens to live beyond these limits, application must be made, at the cost of much time and trouble, to the Central Office of the Supreme Court, whence subpœnas may issue to any place within the jurisdiction of the Supreme Court, and be served anywhere in England.¹

§ 1265.² If a witness, having been duly served with a subpœna, wilfully neglects to appear, he is guilty of *contempt* of court. If a witness duly served, and having his expenses paid, intentionally refuses to be sworn or to testify, he is guilty of contempt, and may, as in all cases of contempt, be punished by fine and imprisonment, at the discretion of the court.³ The usual proceeding employed against a witness who neglects to appear at all is by *attachment*. In order to render a witness liable to this summary proceeding, it is requisite to show distinctly, though by any species of proof, that, on the cause being called on for trial, he was wilfully absent under such circumstances, that, had the trial proceeded, he would not have been forthcoming when required to give evidence. The jury need not be sworn; and it is not essential even that the witness should be called upon his subpœna.⁴

§ 1266.⁵ As an attachment for contempt does not proceed upon the ground of any damage sustained by an individual, but is instituted to vindicate the dignity of the court,⁶ the case must be perfectly clear to justify the exercise of this extraordinary

¹ Corner, Cr. Pr. 256, 257; Crown Cir. Comp. 9, 21; 42 & 43 V. c. 78, § 5. See post, § 1268.

² Gr. Ev. § 319, in some part.

³ 4 Bl. Com. 284-288.

⁴ See *Lamont v. Crook*, 1840, 6 M. & W. 625; *Barrow v. Humphreys*, 1820, 3 B. & Ald. 598; *Dixon v. Lee*, 1834, 1 C. M. & R. 645; *Mullett v. Hunt*, 1833, Car. & M. 752; *Goff v. Mills*, 1844, 13 L. J. Q. B. 227. These cases overrule *Malcolm v. Ray*, 1819, 3 Moore, C. P. 222, and *Bland v. Swafford*, 1791, Peake, R. 60;

and resolve the doubt expressed in *R. v. Stretch*, 1835, 3 A. & E. 503. See *Cast v. Poyser*, 1856, 26 L. J. Ch. 93, 353. The form of calling a witness on his subpœna is, indeed, usually followed, and is convenient, as furnishing satisfactory and cheap evidence of the absence of the witness. In some cases (as if the witness had left England two days before the trial) it would be idle.

⁵ Gr. Ev. § 319, in part.

⁶ *Barrow v. Humphreys*, 1820, 3 B. & Ald. 598.

§§ 1266,
1267.

jurisdiction.¹ For this reason, too, the motion for an attachment should be brought forward as soon as possible,² and the party applying must show by affidavit that a copy of the subpoena was personally and in due time served on the witness,³ that when such service was effected, the original writ was shown to him,⁴ that his fees, if he were entitled to them, were paid or tendered,⁵ or the tender expressly waived,⁶ and, in short, that everything has been done which was necessary to secure his attendance.⁷ It must also appear from the affidavits, that the absence of the witness was an *intentional* defiance of the process of the court.⁸ If, however, all this be clearly shown, the witness, it seems, cannot justify his conduct by proving that his evidence was immaterial.⁹

§ 1267. The fact of immateriality, however, sometimes tends to negative there having been any *intentional* defiance of the court. Thus, an attachment against Lord Brougham was refused, when it was evident, from the notes of the judge, that his presence at the trial would not have served the complainant;¹⁰ the court observing that they would not allow their process to be used for purposes of needless vexation; and in discharging a rule for attachments against Lord John Russell and Mr. Fox Maule, for disobeying writs of subpoena duces tecum, the court relied on the fact that the documents, if produced, would not have been admissible.¹¹ In another case,¹² the rule for an attachment was refused, the witness having had reasonable

¹ *Horne v. Smith*, 1815, 6 Taunt. 9; *Garden v. Cresswell*, 1837, 2 M. & W. 319; *Scholes v. Hilton*, 1842, 11 L. J. Ex. 332; *R. v. Lord J. Russell*, 1839, 7 Dowl. 793.

² *R. v. Stretch*, 1835, 4 Dowl. 30.

³ Ante, §§ 1242-1244.

⁴ *Garden v. Cresswell*, 1837, 2 M. & W. 319; *Jacob v. Hungate*, 1834, 1 M. & Rob. 445; *R. v. Sloman*, 1832, 1 Dowl. 618; *Smith v. Truscott*, 1843, 12 L. J. C. P. 336; *Marshall v. York, &c. Rail. Co.*, 1851, 11 C. B. 398.

⁵ Ante, § 1246; *Connor v. —*, 1842, Ir. Cir. R. 610; *Brocas v. Lloyd*, 1856, 26 L. J. Ch. 758.

⁶ *Goff v. Mills*, 1844, 13 L. J. Q. B. 227.

⁷ 2 Ph. Ev. 432; *Garden v. Cresswell*, 1837, 2 M. & W. 319. See *Hempston v. Humphreys*, 1867, Ir. R. 1 C. L. 271.

⁸ *Scholes v. Hilton*, 1842, 11 L. J. Ex. 332; *Netherwood v. Wilkinson*, 1855, 17 C. B. 226.

⁹ *Chapman v. Davis*, 1841, 1 Dowl. N. S. 239; *Scholes v. Hilton*, 1842, 11 L. J. Ex. 332. These cases appear to overrule *Tinley v. Porter*, 1837, 5 Dowl. 744, and *Taylor v. Williams*, 1830, 2 B. & Ald. 845.

¹⁰ *Dicas v. Lawson*, 1835, 1 C. M. & R. 934.

¹¹ *R. v. Id. John Russell*, and *R. v. Fox Maule*, 1839, 7 Dowl. 693.

¹² *R. v. Sloman*, 1832, 1 Dowl. 618.

ground for believing that he would not be wanted at the trial. Of course, if a witness be too ill to attend,¹ or if leave of absence has been given him by the solicitor of the party requiring his attendance,² no attachment will lie; and, on ordinary principles of justice, it would seem that if in a criminal case, where no fees were tendered, a witness from real poverty should be unable to obey the summons, he would not be guilty of contempt.³ On the other hand, the duty of attending a court of justice in pursuance of a subpoena is paramount to the duty of obedience to the commands of any master, however stringent and express those commands may be;⁴ and on this ground an attachment has issued against a solicitor, who, being served with a subpoena to attend a trial on the following day, went in the morning to a board of guardians to discharge his duty as clerk, and found on his return that the cause had been unexpectedly called on in his absence, the court holding that he had no right to speculate on the chance of being in time.⁵

§§ 1267,
1268.

§ 1268. The High Court will grant an attachment against a witness for disobeying a Central Office⁶ subpoena to give evidence in an inferior court,⁷ provided that distinct proof be given by affidavit that the inferior court had jurisdiction to examine the witness.⁸ But it has no power, either at common law or by statute,⁹ to interfere, unless the writ has issued from the Central Office.¹⁰ In all those cases where process other than a Crown Office subpoena has been granted by a clerk of assize, or clerk of the peace, and a witness has disobeyed the process of the inferior court from which it has issued, such inferior court can only proceed against him, either by the doubtful and arbitrary course of fining him in his absence for the contempt,¹¹ or by the tedious

¹ *In re Jacobs*, 1835, 1 Har. & W. 123. See *Scholes v. Hilton*, 1842, 11 L. J. Ex. 332.

² *Farrah v. Keat*, 1838, 6 Dowl. 470.

³ 2 Ph. Ev. 441.

⁴ *Goff v. Mills*, 1844, 13 L. J. Q. B. 227.

⁵ *Jackson v. Seager*, 1844, 2 Dowl. & L. 13.

⁶ The Crown Office (which formerly issued these subpoenas) is now a department of the Central Office: 42

& 43 V. c. 78, § 5; R. S. C. 1883, Ord. L. XI. r. 1.

⁷ *R. v. Ring*, 1800, 8 T. R. 585; *R. v. Greenaway*, 1845, 7 Q. B. 126.

⁸ *R. v. Vickery*, 1848, 17 L. J. M. C. 129.

⁹ *Viz.*: 45 G. 3, c. 92, as to which see ante, § 1261.

¹⁰ *R. v. Brownell*, 1834, 3 L. J. M. C. 118.

¹¹ See *R. v. Clement*, 1821, 4 B. & Ald. 218, where the fine was imposed by one of the superior judges. Qu.

§§ 1268
—1271.

and therefore useless, process of indictment. In remote counties to obtain a subpoena from the Central Office is often highly inconvenient, occasioning considerable loss of time, and, if a town agent be employed, needless additional expense. A simple and effectual process would be to enact, that every inferior court should, like the Central Office, have the power of issuing subpoenas for witnesses, in whatever part of the country they might reside, and that the High Court should enforce obedience to such subpoenas by the ordinary process of attachment.¹ It is only reasonable that every court, having power definitely to determine any suit, should be enabled, of itself, to compel both the attendance of witnesses and the production of all adequate proofs of the facts in controversy.

§ 1269. The court will not grant an attachment in the first instance, even though a flagrant case of palpable contempt be shown, such as an express and positive refusal to attend. The uniform practice now is to obtain the leave of the court or a judge, "to be applied for on notice to the party against whom the attachment is to be issued."²

§ 1270. Besides proceeding by attachment, in a civil suit the party injured by the non-attendance of a witness has his remedy, either by an "*action of debt*,"³ or by an action for damages at common law. Recourse is seldom had to the action of debt, because, although the party aggrieved may recover thereby a penalty of 10*l.*, in addition to what the court might assess as a satisfaction in damages, yet this assessment must be made, not by the jury or judge at Nisi Prius, but by the court out of which the process issued; and this being inconvenient, it is more advisable to rely on the remedy by attachment, where, if the witness redeems his offence by making satisfaction to the party, the court will generally remit the punishment.⁴

§ 1271. An action for damages is, however, more frequent.

whether justices at sessions could safely exercise the like power.

¹ Ante, § 1264.

² R. S. C. 1883, Ord. XLIV. r. 2. Service of notice on the party's solicitor, or at his place of residence, is sufficient, without personal service on the party himself: *Browning v.*

Sabin, 1877, 5 Ch. D. 511; *In re a Solicitor*, 1880, 14 Ch. D. 152. A judge at chambers may order the writ to issue: *Salm Kyrburg v. Posnanski*, 1884, 12 Q. B. D. 218.

³ Under § 12 of 5 E. c. 9, cited ante, § 1246.

⁴ *Pearson v. Isles*, 1781, 2 Doug. 556.

§ 1271.

To support this it is not necessary, any more than in proceeding by attachment, to show that the jury were sworn, or that the witness was called upon his subpoena;¹ neither is it requisite that the statement of claim should contain a direct and positive averment that the party had a good cause of action or a good defence, but it will suffice to state and prove, that the witness was material, that the trial could not safely proceed without him and that, in point of fact, the party has sustained some damage by the absence of the witness.² If, however, *only one issue* was joined in the former action, the plaintiff practically cannot proceed against a witness for having disobeyed his subpoena, unless he had a good case in the original action as against the other party to it; because, to recover damages from the witness, he must show that he has sustained some loss through his default, and he cannot do this unless he had good grounds on his side in the former suit.³ Where, however, *several issues* were joined in the original action, it may well happen that the plaintiff, though he had no complete cause of action or defence, may have sustained damage in respect of the *costs* of some of the issues, on which, although failing generally in his suit, he might have succeeded by the testimony of the witness, had he duly attended the trial.⁴ In this last class of cases, therefore, the traverse of an averment of a complete ground of action or defence, would simply raise an immaterial issue.⁵ The same strictness of proof with respect to the form and service of the writ, which is necessary to render a witness guilty of contempt, will (it is said) not be requisite in order to sustain an action;⁶ and although for the purpose of bringing the witness into contempt, the original writ must be shown at the time when the copy is served, this is not necessary as the foundation of an action, unless, perhaps, when a sight of the writ has been expressly demanded.⁷

¹ *Lamont v. Crook*, 1840, 6 M. & W. 625. See ante, § 1265.

² *Mullett v. Hunt*, 1833, Car. & M. 752; *Davis v. Lovell*, 1839, 8 L. J. Ex. 152; *Couling v. Cox*, 1848, 18 L. J. C. P. 100. See *Yeatman v. Dempsey*, 1861, 29 L. J. C. P. 177; *Needham v. Fraser*, 1845, 14 L. J. C. P. 256; *Crewe v. Field*, 1896, 12

T. L. R. 405.

³ *Couling v. Cox*, 1848, 18 L. J. C. P. 100 (Wilde, C.J.).

⁴ *Id.*

⁵ *Id.*

⁶ *Davis v. Lovell*, 1839, 8 L. J. Ex. 152.

⁷ *Mullett v. Hunt*, 1833, Car. & M. 752.

§§ 1272,
1273.

§ 1272. When a *witness is in custody*, a writ of subpoena is of no avail, and the party requiring the evidence of such witness must either apply for a *habeas corpus ad testificandum*,¹ or obtain a warrant or order under the hand of one of the judges of the High Court.² Power to issue such warrants is expressly given in many cases by statute. Any judge of the [High Court] may,³ at his discretion, award a writ of habeas corpus for bringing any prisoner, detained in a gaol or prison in England, before any court-martial, any commissioners for auditing public accounts, or other commissioners acting by virtue of any royal commission or warrant, for trial, or to be examined touching any matter depending before such court-martial or commissioners. A judge of the High Court in England or Ireland may, at his discretion,⁴ grant a habeas corpus to bring up *any prisoner*, detained in a gaol or prison, before *any Court of Record*, to be there examined as a witness, and to testify the truth before such court, or any grand, petit, or other jury, in any cause or matter, civil or criminal, depending, or to be inquired into or determined, in any such court. To enable commissioners appointed to take evidence before the trial to obtain evidence from persons in custody, it has been provided,⁵ that "it shall be lawful for any sheriff, gaoler, or other officer having the custody of any prisoner, to take such prisoner for examination under the authority of that Act, by virtue of a writ of habeas corpus to be issued for that purpose, which writ shall and may be issued by any court or judge under such circumstances, and in such manner, as such court or judge may now by law issue the writ commonly called a writ of habeas corpus ad testificandum."

§ 1273. The application for a writ in either of the two first-mentioned cases, if not in the last case, must be made to a judge at chambers,⁶ on an affidavit, stating the place and cause of confinement of the witness, and further that his evidence is material and that the party cannot, in his absence, safely proceed to trial;⁷

¹ See R. S. C. 1883, App. J., Form 2.

² See § 1276, post.

³ By 43 G. 3, c. 140 ("The Habeas Corpus Act, 1803").

⁴ By 44 G. 3, c. 102 ("The Habeas Corpus Act, 1804").

⁵ By 1 W. 4, c. 22, § 6; and by

3 & 4 V. c. 105 ("The Debtors (Ireland) Act, 1840"), § 71, *Ir.*

⁶ Gordon's case, 1814, 2 M. & Selw. 582; *Browne v. Gisborne*, 1843, 12 L. J. Q. B. 297.

⁷ See the form, Chit. Forms, 60; Corner, Cr. Pr., App. 66.

and if the prisoner be confined at a great distance from the place of trial, the judge will perhaps require that the affidavit should point out in what manner his testimony is material.¹ If the witness is to give evidence in a civil suit, it is usual to add in the affidavit that he is willing to attend; but this would seem to be a needless averment, and it is certainly not required in criminal proceedings.² When a party to the record is in custody, he is entitled to the writ for himself as much as for any other witness, provided that his evidence be necessary at the trial.³

§§ 1273—
1275.

§ 1274. Until 1804 neither a *prisoner* in custody for *high treason*,⁴ nor a *prisoner of war*,⁵ could be brought up by a *habeas corpus ad testificandum*. But the words of the Habeas Corpus Act, 1804,⁶ “any prisoner detained in any prison,” are perhaps sufficiently large to warrant the interference of the judge in both these cases; and though considerations of state policy might possibly lead the judges to narrow the interpretation of the statute in the case of prisoners of war, no valid reason can be urged why prisoners charged with high treason should not be placed on the same footing as other prisoners.

§ 1275. Independently of the statutory powers above referred to, the Queen’s Bench Division of the High Court would seem, at *common law*,⁷ to possess the right of awarding writs of *habeas corpus ad testificandum* in certain cases, though the extent of such authority is not distinctly defined. The Legislature has indirectly recognised the power of the superior judges to bring persons detained in *custody* under civil or criminal process before *magistrates*, or Courts of Record;⁸ and the judges have claimed the

¹ *Standard v. Baker*, 1785-6, cited Tidd, 858.

² *Corner*, Cr. Pr. 118.

³ *Ex parte Cobbett*, 1858, 4 Jur. N. S. 145.

⁴ *Langston v. Cotton*, 1795, Peake, Add. Cas. 21.

⁵ *Furly v. Newnham*, 1780, 2 Doug. 419. Lord Mansfield stated, with respect to a prisoner of war, that application should be made to the Secretary of State. The court, however, on the Secretary of State refusing to interfere, granted a rule to show cause why the adverse party should not consent, either to admit

the facts, or that the prisoner should be examined on interrogatories; adding, that if this consent should be refused, they would put off the trial from time to time, in order to give the applicant an opportunity of filing a bill in equity.

⁶ Contained in the Act 44 G. 3, c. 102.

⁷ See *R. v. Freind*, 1696, 13 How. St. Tr. 2; *R. v. Burbage*, 1763, 3 Burr. 1440.

⁸ See preamble of 43 G. 3, c. 140 (“The Habeas Corpus Act, 1803”); and *Ex parte Griffiths*, 1822.

§ 1275. right of granting these writs in other analogous cases.¹ Thus, on an affidavit that he is not dangerous, and is in a fit state to be examined, a writ has been awarded to bring up the body of a person confined as a lunatic, to give evidence in a cause;² a prisoner in civil custody has been brought up by habeas corpus, for the purpose of being examined as a witness before an arbitrator;³ and on an affidavit that the rule to show cause had been served on the under-sheriff, on the Solicitor of the Treasury, on the prisoner himself, and on the party at whose suit he was in execution, and on no cause being shown, a habeas corpus has issued to bring up a prisoner committed for non-payment of a fine, to give evidence before an election committee.⁴ On a similar application to that in the last case being subsequently made to the court (the only difference being that the prisoner was in custody on a charge of felony), the judges, however, doubted their power, but granted a rule nisi, directing notice to be given to the Attorney-General, to the committing magistrate, to the person having the custody of the prisoner, and to all parties at whose suit he might be detained on civil process;⁵ but the point was not settled, as it eventually became unnecessary to call upon the court to make the rule absolute. A witness in the military or naval service, who is not at liberty to attend without the leave of his superior officer, which he cannot obtain, may be brought into court to testify by a writ of habeas corpus, which, however, will be refused, unless the affidavit states that the witness has been served with a subpœna, and is willing to attend; for a free man cannot be brought up as a prisoner against his consent.⁶ The writ in such cases as the above will be directed to the gaoler, sheriff, commanding officer, or other person, in whose custody, or under whose control, the witness is detained, who,

¹ See *In re Cook*, 1845, 14 L. J. Q. B. 183, where the issue of a writ of habeas corpus to bring up a prisoner, committed on a charge of murdering A., before a coroner's jury, who were sitting on A.'s body, for the purpose of his being *identified* by the witnesses was refused, but the judges seemed to be of opinion, that they had power to issue such writ in a case of necessity. See, also, *Daniel v. Thompson*, 1812, 15 East,

78; *Att.-Gen. v. Fadden*, 1815, 1 Price, 403.

² *Fennell v. Tait*, 1834, 1 C. M. & R. 584.

³ *Graham v. Glover*, 1855, 25 L. J. Q. B. 10; *Marsden v. Overbury*, 1856, 25 L. J. C. P. 200.

⁴ *In re Price*, 1804, 4 East, 587.

⁵ *In re Pilgrim*, 1835, 4 L. J. M. C. 120.

⁶ *R. v. Roddam*, 1777, 2 Cowp. 672.

on being served with it, and being paid or tendered his reasonable charges, will be bound to produce him according to the exigency of the writ.

§§ 1275,
1276.

§ 1276. In addition to the power to bring up a prisoner to give evidence under a writ of habeas corpus it was, in 1853, provided¹ that any Secretary of State,² and any Common Law Judge of the High Court³ may, if he think fit, "upon application by affidavit, issue a warrant or order under his hand, for bringing up any prisoner or person confined in any gaol, prison, or place, under any sentence, or under commitment for trial or otherwise, (*except* under process in any *civil* action, suit, or proceeding,) before any court, judge, justice, or other judicature, to be examined as a witness in any cause or matter, civil or criminal, depending or to be inquired of, or determined in or before such court, judge, justice, or judicature; and the person required by any such warrant or order to be so brought before such court, judge, justice, or judicature, shall be so brought under the same care and custody, and be dealt with in like manner in all respects, as a prisoner required by any writ of habeas corpus awarded by any of her Majesty's Superior Courts of Law at Westminster, to be brought before such court to be examined as a witness in any cause or matter depending before such court, is now by law required to be dealt with."⁴

¹ By 16 & 17 V. c. 30 ("The Criminal Procedure Act, 1853"), § 9.

² These words were repealed by the Prison Act, 1898 (61 & 62 V. c. 41), which provides in their place (§ 11) a provision that "A Secretary of State on proof to his satisfaction that the presence of any prisoner at any place is required in the interest of justice, or for the purpose of any public inquiry, may, by writing under his hand, order that the prisoner be taken to that place."

³ Although the Act limited the power to the then Common Law Judges it is now assumed by the Chancery Judges also. For the practice in the C. D., see *Jenks v. Ditton*, 1897, 76 L. T. 591.

⁴ As to Ireland, it was long previously enacted by § 2 of 38 G. 3, c. 26, that "it shall be lawful for

the justices of Assize, or Nisi Prius, or the commissioners of oyer and terminer and gaol delivery, by order in writing to be by them respectively signed, to direct any person in execution, and in the custody of any sheriff or other officer, in any county wherein they shall sit, to be brought up for the purpose of giving evidence in any cause or trial to be had before them respectively." The Court of Bankruptcy in Ireland is also empowered by warrant or order to cause any bankrupt, or any person supposed to be possessed of his goods, or to be indebted to him, or to be acquainted with his dealings, to be brought from any prison in which he may be in custody for the purpose of being examined (35 & 36 V. c. 58, § 73, Ir. See, also, § 74, as to the costs of such removal). Again, both

§§ 1277—
1279.

§ 1277. It will now be convenient to consider the powers possessed by some courts of enforcing the attendance of witnesses either to actually appear before them, at a trial or hearing, or to take the evidence of witnesses on commission, and to enforce the attendance of witnesses before such commission. After this¹ the mode of compelling the attendance of witnesses before magistrates will be considered.

§ 1277A. Stated in the order of their comparative importance, the eight most important of the tribunals possessed of one or both of these powers would appear to be—(i.) The Houses of Parliament; (ii.) The Privy Council; (iii.) The High Court, at Assizes, and upon other occasions in its various Divisions, in its Chambers, and before its Examiners; (iv.) Ecclesiastical Courts; (v.) Bankruptcy Courts; (vi.) Coroners' Courts; (vii.) County Courts; and, (viii.) Arbitrators' Courts.

§ 1278. A short statement of the practice of each of these, as regards the summoning of witnesses to actually appear before them and give evidence, will accordingly be given in the above order.

§ 1278A. In the first place, the attendance of witnesses before either House of Parliament, or a committee thereof, is regulated as follows:—

§ 1279. In the House of Lords, witnesses who are required to give evidence before the House itself, are served with an order of the House, signed by the assistant clerk of the Parliaments, which directs them to attend at the bar on a certain day to be sworn and examined.² A witness required to testify before a committee of the House of Lords is ordered to attend, not at the bar of the House, but before the particular committee. Any committee may administer an oath to the witnesses examined before it;³ and the committees on Private Bills, in the event of the House making

in England and Ireland even "the county court judges" have been intrusted, to a limited extent, with the power of ordering prisoners to be brought up as witnesses before their respective courts (51 & 52 V. c. 43, § 112; 27 & 28 V. c. 99, § 43, Ir.; 40 & 41 V. c. 56, § 3, Ir.). Similar powers have been conferred on cer-
tain functionaries, for the purpose

of bringing military convicts, under special circumstances, before courts-martial or civil courts as witnesses (44 & 45 V. c. 58, § 60, sub-sect. 8; and § 63, sub-sect. 7).

¹ *Infra*, § 1316.

² 66 Lords' J. 400; May, L. of Parl. 397 et seq.

³ 21 & 22 V. c. 78, § 2.

no special order, take evidence on oath.¹ The *Select Committees*, however, now examine witnesses unsworn, unless otherwise ordered by the House.² The service of the order must, generally, be personal, but if the witness be purposely keeping out of the way, it is usual to direct that a service at his house shall be deemed sufficient.³ If he disobey this summons, the House will order him to be taken into custody, either forthwith,⁴ or after the expiration of a certain time;⁵ and if the Black Rod cannot succeed in taking him, the House will address the Crown to issue a proclamation, offering a reward for his apprehension.⁶ When the evidence of peers, peeresses, or Lords of Parliament is required, the Lord Chancellor is ordered to write letters to them, desiring their attendance to be examined as witnesses;⁷ and such persons are sworn by the Lord Chancellor at the table,⁸ while all other witnesses, if required to be examined on oath, are sworn at the bar by the officer of the House.⁹ If the witness be a member, or an officer, of the House of Commons, a message is sent to that House requesting his attendance;¹⁰ upon which the Lower House returns answer, by its messenger, that it gives him leave to attend, adding, in case he be a member, "if he think fit."¹¹ If the witness, on attending, refuse to be sworn, or prevaricate, or otherwise misbehave, he will be punished by the House as for contempt; and if he give false evidence after being sworn, he may be indicted for perjury.¹²

§ 1280. In the *House of Commons* the practice pursued is very similar. Witnesses required to give evidence before the House itself are summoned to attend by an order of the House signed by the clerk, which is either personally served upon them, or, if they live at a distance, is forwarded to them by post, or sometimes by a special messenger. If, after service, the witness neglect to attend, or if he abscond, the Speaker, by order of the House, will issue his warrant, directing the serjeant-at-arms to apprehend the witness, and to bring him to the bar; whereupon

¹ Min. of H. L. 4th June, 1857.

² Id.

³ 66 Lords' J. 295.

⁴ Id. 400.

⁵ Id. 358.

⁶ Id. 441.

⁷ 75 Lords' J. 144.

⁸ Id. 201.

⁹ May, L. of Parl. 404.

¹⁰ 75 Lords' J. 157.

¹¹ Id. 164.

¹² May, L. of Parl. 405, 406.

§§ 1280,
1281.

he will generally be committed to prison ; as will also all persons who aid him in his endeavours to keep out of the way.¹ If the attendance in the House of Commons as a witness of a Lord of Parliament or of an officer of the Upper House be desired, the Commons adopt the same form of proceeding as that adopted by the Lords, when they require the attendance of a member of the Lower House ;² but whether this form be necessary, if the witness be simply a peer or peeress, is a matter upon which the two branches of the Legislature appear to be at issue.³ If the testimony of a member be desired by the House, or by a committee of the whole House, he is ordered to attend in his place ; but if he be required to give evidence before a select committee, such committee should request his attendance, and if he refuse to appear, should acquaint the House therewith, who will then order him to attend, and, if necessary, will even commit him to the custody of the serjeant-at-arms, that he may be forthcoming at the proper time.⁴ If a person in custody is required to give evidence, the Speaker usually issues his warrant, which is personally served on the gaoler by a messenger of the House, and by which he is directed to bring the witness in his custody to be examined.⁵ Some doubts, however, have been entertained as to the legality of this course, and on one or two occasions, writs of habeas corpus ad testificandum have, in order to protect the gaoler, been applied for.⁶ When a witness is required to be examined before a *Select Committee*, the chairman, by direction of the committee, in general signs an order for his attendance ; and if this order be disobeyed, his conduct is reported to the House, which immediately issues the usual order, to be enforced as in other cases. The attendance of a witness before a committee on a private bill can only be enforced by an order of the House.⁷

§ 1281. Under "The Parliamentary Witnesses Oaths Act,

¹ Id. 398; *Gossett v. Howard*, 1845, 16 L. J. Q. B. 345.

² May, L. of Parl. 401, 402; 83 Com. J. 278; 91 id. 75; 82 id. 465.

³ May, L. of Parl. 402; 4 Lords' J. 812.

⁴ May, L. of Parl. 400.

⁵ May, L. of Parl. 398; 90 Com.

J. 533. The order of the House of Lords has been used for the same purpose: May, L. of Parl. 397.

⁶ See ante, § 1275; *In re Price*, 1804, 4 East, 587; *In re Pilgrim*, 1835, 4 L. J. M. C. 120.

⁷ May, L. of Parl. 399; 98 Com. J. 153, 174, 279, 288.

1871,"¹ the House of Commons is now empowered to administer an oath to the witnesses examined at the bar of the House, and any committee of the House may administer an oath to the witnesses examined before such committee. Any oath under the Act may be administered by the Speaker,² or, in the case of a witness before the House or a committee of the whole House, by the clerk at the table;³ and any witness before a select committee may be sworn by the chairman, or by the clerk attending such committee.⁴ Any attempt to intimidate a witness summoned before a committee of either House or a Royal Commission is a misdemeanour, and the person committing it is liable not only to a fine not exceeding 100*l.* and to three months' imprisonment, but also to be ordered to make compensation to the witness.⁵

§ 1282. In the second place, witnesses are forced to attend before the *Judicial Committee of the Privy Council* by the President of the Council requiring the attendance of such witnesses, and the production of any deeds, evidences, or writings, by writ issued by him in the same form, as nearly as may be, as that in which a writ of subpœna ad testificandum, or of subpœna duces tecum, is now issued by the High Court; and every person disobeying such writ is considered as in contempt of the Judicial Committee, and liable to the same penalties and consequences as if such writ had issued out of the Queen's Bench Division of the High Court; and may be sued for such penalties in that court.⁶

§ 1283. The third subject for consideration is as to how the attendance of witnesses is secured at Assizes and at sittings of the High Court. In *criminal* cases, this is done either by a recognisance⁷ or by a subpœna being issued from the Crown Office⁸ and served upon him; and in civil cases it is effected by a subpœna being issued out of the Central Office.⁹ It has been

¹ 34 & 35 V. c. 83, § 1.

² *Id.*

³ Stand. Ord. passed 20th Feb., 1872.

⁴ *Id.*

⁵ See 55 & 56 V. c. 64 ("The Witnesses (Public Inquiries) Protection Act, 1892").

⁶ See 3 & 4 W. 4, c. 41, § 19.

Similar powers are conferred on the Court of Appeal in Chancery in Ireland by § 104 of "The Court of Admiralty (Ireland) Act, 1867."

⁷ See ante, §§ 1234 et seq.

⁸ See ante, § 1249.

⁹ See ante, §§ 1239, 1265. As to cases in bankruptcy, see *infra*, § 1289.

§§ 1283,
1284.

enacted that "the service in any part of Great Britain or Ireland of any writ of subpoena ad testificandum, or subpoena duces tecum, issued under seal of the Admiralty Division, shall be as effectual as if the same had been served in England or Wales."¹ The Divorce Division of the High Court in England² "may, under its seal, issue writs of subpoena or subpoena duces tecum, commanding the attendance of witnesses at such time and place as shall be therein expressed; and such writs may be served in *any part of Great Britain or Ireland*; and every person served with such writ shall be bound to attend and to be sworn and give evidence in obedience thereto in the same manner as writs of subpoena or subpoena duces tecum issued from any of the said superior courts of common law and served in Great Britain or Ireland."³ The attendance of witnesses and the production of documents are now enforced in the Probate Divisions of the High Courts, whether for England or Ireland, by the ordinary writs of subpoena ad testificandum and subpoena duces tecum, which are issued by the High Court;⁴ and "every person disobeying any such writ shall be considered as in contempt of the court, and also be liable to forfeit a sum not exceeding 100l."⁵

§ 1284. The attendance of a witness in the *chambers* of the High Court is enforced by means of a subpoena. Such subpoena issues from the Central Office upon a note from the judge.⁶ Again, when a Chief Clerk⁶ is directed by a judge in the Chancery

¹ 24 V. c. 10 ("The Admiralty Court Act, 1861"), § 21. See similar enactments in "The Court of Admiralty (Ireland) Act, 1867" (30 & 31 V. c. 114, §§ 52, 69, Ir.).

² "The Matrimonial Division" of the High Court in Ireland would seem to have the same powers as the Chancery Division "for enforcing the attendance of persons required by it" (34 & 35 V. c. 49, § 6, Ir.; 40 & 41 V. c. 57, § 34, Ir.).

³ 20 & 21 V. c. 85 ("The Matrimonial Causes Act, 1857"). A subpoena in the Divorce Division is written, or printed on parchment, and may include the names of any number of witnesses. See Rules of 1865, for Court of Divorce and Matrimonial Causes, r. 106, and Forms 16 and 18; and see, also,

r. 180 for the same court, made 30th January, 1869, and set out L. R. 1 P. & D. 757, 765—768.

⁴ 20 & 21 V. c. 77 ("The Court of Probate Act, 1857"), § 24; 20 & 21 V. c. 79, § 29, Ir. See, also, *Shepherd v. Beetham*, 1872, L. R. 2 P. & D. 384. 21 & 22 V. c. 95, § 23, empowers the registrars of the Principal Registry of the Court of Probate in England, whether any suit or proceeding be pending in the court or not, to issue subpoenas, requiring any persons to produce testamentary papers. See, also, ante, § 1265.

⁵ R. S. C. 1883, Ord. XXXVII. r. 28. If the proceedings are before a master, a note from the master is sufficient (P. M. R. 14).

⁶ As to the attendance of witnesses

Division to examine any party or witness, he is authorised to enforce the attendance of such party or witness by *summons*,¹ and if this summons be not obeyed, the party or witness will be liable to process of contempt, in like manner as he would be, were he to disobey any order of court, or any writ of subpoena.² A witness who refuses to be sworn, when summoned before a Chief Clerk, does so at the risk of being committed by the court;³ and if he answers in an unsatisfactory manner, an application should be made to have him examined by the judge.⁴ He may, it seems, himself apply to the Chief Clerk, on special grounds, either to have the assistance of counsel, or to have the inquiry adjourned into court.⁵

§ 1285. The attendance of a witness before an Examiner of the High Court can only be enforced by the somewhat awkward and unwieldy, as well as costly, means of an application to the Court itself.⁶ An examiner, however, has power to administer an oath.⁷

§ 1286. Under the Companies Act, 1862, the High Court is empowered to wind up the affairs of any company, and such court and any of its commissioners who are authorised to take evidence for the purposes of the Act, may respectively enforce the attendance of witnesses,⁸ and the production of docu-

before "the Taxing Officers of the Supreme Court, or of any Division thereof," see R. S. C. 1883, Ord. LXV. r. 27, sub-sect. 25.

¹ For "Form of Summons by Chief Clerk," see App. L. No. 1 of the Rules of 1883. This summons is only good for one attendance, unless the examination of the witness be adjourned: *Lawson v. Stoddart*, 1863, 3 N. R. 241.

² R. S. C. 1883, Ord. LV. rr. 16, 17.

³ In re The Elect. Electr. Co. of Ireland, Ex parte Bunn, 1857, 26 L. J. Ch. 614.

⁴ *Hayward v. Hayward*, 1854, Kay, Appendix XXXI. See, however, *Venables v. Schweitzer*, 1873, L. R. 16 Eq. 76.

⁵ In re The Elect. Electr. Co. of Ireland, Ex parte Bunn, 1857, 26 L. J. Ch. 614.

⁶ See R. S. C., Ord. XXXVII.,

cited ante, § 504, rr. 5—7, cited *infra*, § 1310; and also *Stewart v. The Balkis Co.*, 1883, 53 L. J. Ch. 760, cited § 512. And see further, *infra*, § 1310.

⁷ See R. S. C. Ord. XXXVII r. 19.

⁸ 25 & 26 V. c. 89, §§ 115, 126, 138. See *Swan's case*, 1870, L. R. 10 Eq. 675; In re Engl. Jt. Stock Bk., 1866, L. R. 3 Eq. 203; In re Financial Ins. Co., 1867, 38 L. J. Ch. 687; In re Breech Loading Armoury Co., and In re Merchant's Co., 1867, L. R. 4 Eq. 453; In re Accidental & Mar. Ins. Co., 1867, L. R. 5 Eq. 22; In re The Mercant. Credit Associat., *Clement's case*, 1868, 37 L. J. Ch. 295; In re Contract Corp., 1871, L. R. 6 Ch. 146; Re The London Gas Meter Co., 1872, 41 L. J. Ch. 145; *Druitt's case*, 1872, L. R. 14 Eq. 6; *Trower and Lawson's case*, 1872, L. R. 14 Eq. 8; *Forbes'*

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ments,¹ by summons and warrant. A summons cannot be claimed as a matter of right, but the court must be satisfied that to grant it will be just and beneficial.² As a general rule the examination of the witness rests with the official liquidator, but the court, in its discretion, may empower any contributories to issue summonses, to attend the inquiry, and to examine or cross-examine the persons summoned.³ The practice in these cases has been assimilated to that in bankruptcy, and there is a disposition to put a liberal interpretation upon the statute, which enables the judges to summon "any person whom the court may deem capable of giving information concerning the trade, dealings, estate, or effects of the company."⁴ A witness summoned under this enactment apparently has no *locus standi*, unless he can establish a want of jurisdiction,⁵ to appeal against the order;⁶ and even if this be not so, it is clear that a court of appeal would not interfere with the discretion of the judge, unless under extremely special circumstances.⁶ A witness is, however, entitled to be attended by his counsel or solicitor, who may ask him such questions as may be necessary to explain the evidence he has given, and who may also take notes of the proceedings for the purpose of conducting such re-examination, but for that purpose only.⁷ Any deposition, taken in accordance with the above provisions, may be used as evidence on a summons against the party by whom it has been made, but the court might possibly require that notice of the intention to read the deposition be first given.⁸

§ 1287. The fourth matter for consideration is as to enforcing the attendance of witnesses before *Ecclesiastical Courts*. This is in England required by a *compulsory*, which is an instrument

case, 1872, 41 L. J. Ch. 467; In re Bk. of Hindustan, Fricker's case, 1871, L. R. 13 Eq. 178; Massey v. Allen, 1879, 13 Ch. D. 558.

¹ See *Ex parte Paine and Layton*, 1869, L. R. 4 Ch. 215; In re Smith, Knight & Co., 1869, L. R. 4 Ch. 421.

² *Heiron's case*, 1880, 15 Ch. D. 139 (C. A.).

³ *Whitworth's case*, 1881, 19 Ch. D. 118 (C. A.).

⁴ See cases cited in last four notes. Also *Re Lisbon Steam Tramways Co.*, 1876, 2 Ch. D. 575.

⁵ *Whitworth's case*, 1881, 19 Ch. D. 118 (C. A.).

⁶ *Re The Gold Co.*, 1879, 12 Ch. D. 77.

⁷ In re *Cambrian Mining Co.*, 1881, 20 Ch. D. 376.

⁸ *Pugh and Sharman's case*, 1872, L. R. 13 Eq. 566.

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somewhat in the nature of a subpoena.¹ If the witness on the return of this process does not appear, the court may pronounce him contumacious,² and signify the same to His Majesty in Chancery within ten days.³ On the “significavit” being lodged at the Crown Office,⁴ the offending party will be arrested and detained in custody⁵ unless he be a Peer or Lord of Parliament, or a member of the House of Commons, until he either submit to the court, or be absolved or discharged by order of the Ecclesiastical Judge.⁶ His expenses, however, must be tendered or paid by the party calling him, as in civil proceedings before the common-law courts.⁷ The Clergy Discipline Act, 1892,⁸ provides for the prosecution, in the Consistory Court of the diocese, of clergymen charged with certain offences.⁹ Witnesses as to any charge under the Act are summoned by a “compulsory,” issued according to the ordinary practice of the Consistory Court.

§ 1288. By the Public Worship Regulation Act, 1874,¹⁰ in all proceedings before the judge appointed under that Act, the evidence must be given *vivâ voce*, in open court, and upon oath.¹¹ The Act just named also provides that “the judge shall have the power of a court of record, and may require and enforce the attendance of witnesses, and the production of evidences, books, or writings, in the like manner as a judge of the High Court.”¹²

§ 1289. The fifth subject to be considered is the means of obliging witnesses to attend in Courts of Bankruptcy. The attendance of witnesses before Courts of Bankruptcy is enforced in part under Regulations contained in the Bankruptcy Rules of 1886, and in part under the Bankruptcy Act, 1883.¹³ The

¹ Coote's Eccl. Pr. 780. See the rules and regulations of the Arches Court, 1867, and Reg.-Gen. of 1877, for Consist. Court of London, Ord. IX. r. 4.

² *Wyllie v. Mott*, 1827, 1 Hagg. Ecc. 34.

³ 53 G. 3, c. 127, § 1; and see 2 & 3 W. 4, c. 93, § 1.

⁴ R. S. C. Jan. 1889.

⁵ *Dale's case*, 1881, 6 Q. B. D. 474; and see *Green v. Lord Penzance*, 1881, 6 App. Cas. 657.

⁶ *Hudson v. Tooth*, 1877, 2 P. D.

125; *Dean v. Green*, 1882, 8 P. D. 79.

⁷ *Ayliffe*, Par. 536; 1 Ought. 121; 3 Burn. Ec. Law, 309.

⁸ 55 & 56 V. c. 32, § 9.

⁹ Id. § 2.

¹⁰ 37 & 38 V. c. 85.

¹¹ Id. § 9.

¹² See Rules and Orders, made under the Act, on 22nd Feb., 1879, and contained in 4 P. D. 250, 261, 283; and in 49 L. J. Ord. and Rules, pp. 7, 22.

¹³ 46 & 47 V. c. 52.

§ 1289. former provide, by R. 61, that "a subpoena for the attendance of a witness shall be issued by the court at the instance of an official receiver, a trustee, a creditor, a debtor, or any applicant or respondent in any matter, with or without a clause requiring the production of books, deeds, papers, documents, and writings in his possession or control, and in such subpoena the names of three witnesses may be inserted."¹ R. 62 then directs, that "a sealed copy of the subpoena shall be served *personally* on the witness by the person at whose instance the same is issued, or by his solicitor, or by an officer of the court, or by some person in their employ, within a reasonable time before the time of the return thereof;" while R. 63 provides, that "service of the subpoena may, where required, be proved by affidavit." Under R. 69, "The court may, in any matter, at any stage of the proceedings, order the attendance of any person, for the purpose of producing any writings or other documents named in the order which the court may think fit to be produced;" and further, by R. 66, it may, in any matter where it shall appear *necessary* for the purposes of justice, make an order for the examination upon oath of any witness or person, either before the court, or any of its officers, or before any other person and at any place. If any person wilfully disobeys any such *order* or *subpoena*, he shall, under R. 70, "be deemed guilty of contempt of court, and may be dealt with accordingly." The refusal of a witness to be sworn, or to answer any lawful question, will be regarded also in the light of a grave contempt.² R. 71 further provides that, "any witness (other than the debtor), required to attend for the purpose of being examined or producing any document, shall be entitled to the like conduct money, and payment for expenses and loss of time, as upon attendance at a trial in court."³ In addition to the above general regulation, the Bankruptcy Act, 1883,⁴ contains, in sect. 27, an enactment, framed with the

¹ See Forms 104, 105, and 106, the two former applicable in the London Bankruptcy Court, the last in the County Courts. In not one of the forms is any penalty specified. See ante, § 1239.

² Ex parte Close, Re Bennett and Glave, 1877, 5 Ch. D. 145 (C. A.).

³ See Scale of Allowances, printed in Appendix. A witness cannot be committed for contempt unless a reasonable sum to cover his expenses has been tendered to him: Batson, In re, 1894, 70 L. T. 383.

⁴ 46 & 47 V. c. 52. The Act of 20 & 21 V. c. 60, Ir., contains, in

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view of facilitating the discovery of the property of debtors, in these words :—“(1) The court may, on the application of the *official receiver* or *trustee*, at any time after a receiving order has been made against a debtor, summon¹ before it the debtor, or his wife, or any person known or suspected² to have in his possession any of the estate or effects belonging to the debtor, or supposed to be indebted to the debtor, or any person whom the court may deem capable of giving information respecting the debtor, his dealings, or property; and the court may require any such person to produce any documents in his custody or power relating to the debtor, his dealings, or property.³ (2) If any person so summoned, after having been tendered a reasonable sum,⁴ refuses to come before the court at the time appointed, or refuses to produce any such document, having no lawful impediment made known to the court at the time of its sitting, and allowed by it, the court may, by warrant,⁵ cause him to be apprehended and brought up for examination. (3) The court may examine on oath, either by word of mouth or by written interrogatories, any person so brought before it concerning the debtor, his dealings or property.” The provisions of the above enactment are not too clear in themselves, but have been greatly explained either by Rule, or by judicial decision. First, a Rule requires,⁶ that the application for a summons be in writing, and state shortly the grounds on which it is made; and that where it is *not* made by the trustee, official receiver, or Board of Trade, it be verified by affidavit. Next, the court has power,⁷ if it be thought desirable, to act at the instance not only of the Board of Trade, but of any creditor, or

§§ 126, 308, somewhat similar provisions respecting the attendance of witnesses before the Court of Bankruptcy in Ireland. See 35 & 36 V. c. 58, § 6, Ir. See, also, ante, § 1277.

¹ See Bkptcy. Rules of 1883, F. 107.

² See *Cooper v. Harding*, 1845, 7 Q. B. 928.

³ See *Ex parte Tatton*, *Re Thorp*, 1881, 17 Ch. D. 512.

⁴ The witness so summoned is not entitled to the costs of employing a

solicitor or counsel: *Ex parte Waddell*, *In re Lutscher*, 1877, 6 Ch. D. 328 (C. A.); nor to a copy of his deposition, unless he be also a creditor: *Ex parte Pratt*, *Re Hayman*, 1882, 21 Ch. D. 493.

⁵ See Bkptcy. Rules of 1886, F. 120.

⁶ Bkptcy. Rules of 1886, r. 78.

⁷ *Ex parte Crossley*, *Re Taylor*, 1872, L. R. 13 Eq. 409; *Ex parte Nicholson*, *Re Willson*, 1880, 14 Ch. D. 243 (C. A.); *Ex parte Austin*, 1876, 4 Ch. D. 13.

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1290.

of the bankrupt himself, and to order the examination of any person, including even the trustee.¹ Thirdly, the court apparently has a discretion to direct, that the summons shall be served by any person who is authorised to serve a subpœna;² but it is a matter of doubt whether the summons requires personal service like the subpœna, or whether, in the event of the witness keeping out of the way, it may be served by delivery at his house. The court would, it seems, have no jurisdiction to order a witness thus brought before it to furnish an account in writing of his dealings with the bankrupt;³ and its power to compel a person to give evidence, who is actually present, but who is not attending in pursuance of subpœna or warrant, is at least doubtful.⁴

§ 1290. The sixth tribunal whose practice as to the attendance of witnesses must be considered, is that of Coroners' Courts. The attendance of witnesses before *coroners* is provided for by the Coroners Act, 1887,⁵ which enacts,⁶ that "where a person, duly summoned to give evidence at an inquest, does not, after being openly called three times, appear to such summons, or appearing refuses, without lawful excuse, to answer a question put to him, the coroner may impose on such person a *fine not exceeding forty shillings*." The same Act,⁷ after authorising coroners to order *medical witnesses* to attend inquests, &c., and enabling such witnesses to claim a certain remuneration for their attendance,⁸—enacts, in § 28, that where a medical practitioner fails to obey a summons of a coroner issued in pursuance of the Act he shall,

¹ Who in such case must be served with notice of the application: *Re Whicher, Ex parte Stevens*, 1888, 5 Morrell, Bk. 173.

² *Ex parte Bolland, Re Holden*, 1874, L. R. 19 Eq. 131.

³ *Ex parte Reynolds*, 1882, 21 Ch. D. 601.

⁴ See § 110 of "The Bankruptcy Act, 1883"; and also ante, § 1242, *ad fin*.

⁵ 50 & 51 V. c. 71.

⁶ § 19, sub-s. 2.

⁷ § 21.

⁸ The fee to which, in Great Britain, a legally qualified medical practitioner is entitled, for attending to give evidence at an inquest, is one guinea, and for making a post-

mortem examination of the deceased, either with or without an analysis of the contents of the stomach or intestines, and for attending to give evidence thereon, is two guineas (§ 22 of "The Coroners Act, 1887"). These sums must now be paid to the medical man by the coroner immediately after the termination of the proceedings at any inquest, and the coroner will be repaid as provided by "The Coroners Act, 1887" (50 & 51 V. c. 71), § 26. As to the Irish regulations on the subject, see 9 & 10 V. c. 37 ("The Coroners (Ireland) Act, 1846"), §§ 22, 28, 32—35, 44, Ir.; and, also, 44 & 45 V. c. 35, § 5, Ir.

unless he shows a good and sufficient cause for not having obeyed it, be liable on summary conviction, on the prosecution of the coroner or of any two of the jury, to a fine not exceeding £5.

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§ 1291. The seventh matter is as to the mode of compelling witnesses to attend before the *County Courts*, and is regulated in part by the County Court Act, 1888,¹ and in part by the C. C. Rules, 1903. The Act provides² that "either of the parties to any action or matter may obtain from the registrar summonses to witnesses, with or without a clause requiring the production of books, deeds, papers, and writings in the possession or control of the person summoned as a witness;³ and such summonses, and any summonses which are now or may be required to be served personally, may, under such regulations as may be prescribed, be served by a bailiff of the court or otherwise." Order XVIII., Rule 3, of C. C. Rules, 1903, provides that "summonses to witnesses to be served either in the home or in any foreign district⁴ may be issued without leave, and may, by leave of the court, be issued in blank, and served by the party applying for the same or by his solicitor,⁵ or a solicitor acting as agent for such solicitor, or by some person in the permanent and exclusive employment of the party or such solicitor, but in any case only *one* name shall be inserted in such summons." By R. 4 "it shall be sufficient if a summons to a witness is served within a reasonable time; and such summons may be served by delivering the same to the witness personally, or to some person apparently not less than sixteen years old at the house or place of dwelling, or place of business of the witness, or in the cases mentioned in Rules 18, 19, 21, and 22 of Order VII.⁶ in the manner prescribed by

¹ 51 & 52 V. c. 43, § 110.

² *Id.*

³ C. C. R. 1903, Appendix, Form 123, and Summons to Produce Documents, Form 124.

⁴ This provision resolves a doubt which formerly existed, respecting the legality of the service when the witness lived out of the jurisdiction.

⁵ See form of affidavit of service of summons, C. C. R. 1903, Appendix, Form 125.

⁶ These cases are persons living or serving on board a ship; persons residing or quartered in barracks and

serving his Majesty as soldiers or marines; persons working in mines; and persons employed and dwelling in a lunatic or other public asylum, or in any common gaol or house of correction. Service on these is effected by delivery to the person on board the ship who is at the time of the service apparently in charge of the ship; by delivery at the barracks to the adjutant of the corps or to any officer or sergeant of the company or troop to which the sailor or marine belongs; by delivery at the mine to the person apparently in charge;

§ 1291. those rules for an ordinary summons," and the County Court Act, 1888,¹ enacts, that "every person summoned as a witness, either personally or in such other manner as shall be prescribed, to whom at the same time payment or a tender of payment of his expenses shall have been made, on the prescribed scale of allowances, and who shall refuse or neglect, without sufficient cause, to appear, or to produce any books, papers, or writings required by such summons to be produced, or who shall refuse to be sworn or give evidence; and also every person present in court who shall be required to give evidence, and who shall refuse to be sworn or give evidence, shall forfeit and pay such fine, not exceeding *ten pounds*, as the judge shall direct; and the whole or any part of such fine, in the discretion of the judge, after deducting the costs, shall be applicable towards indemnifying the party injured by such refusal or neglect, and the remainder thereof shall be accounted for by the registrar to the Treasury." In addition to the above enactment, it is also provided, that "the court may in any action or matter at any stage of the proceedings order the attendance of any person for the purpose of being examined or of producing to or before any examiner any documents which the court may think fit to be produced, and any person served with any such order shall be bound to attend accordingly: Provided that no person shall be compelled to produce under any such order any writing or other document which he could not be compelled to produce at the trial."² The County Courts Act, 1888,³ provides that the judge may in any case where he shall think fit, upon application on an affidavit by either party, issue an order under his hand and the seal of the court for bringing up to be examined as a witness, any prisoner or person confined in any gaol, prison, or place under any sentence or under any commitment for trial or otherwise, except under process in any civil action or matter. Tender of a reasonable sum for expenses must be made to the person having custody of the prisoner.⁴

and to the gate-keeper or lodge-keeper of the asylum, gaol or house of correction.

¹ 51 & 52 V. c. 43, § 111.

² C. C. R. Ord. XVIII. r. 20.

³ 51 & 52 V. c. 43, § 112.

⁴ *Id.*

§ 1292. Eighthly, and lastly, the attendance of witnesses before ordinary *arbitrators* acting in England under a submission, is regulated by the Arbitration Act, 1889,¹ by which² “any party to a submission may sue out a writ of subpoena ad testificandum, or a writ of subpoena duces tecum, but no person shall be compelled under any such writ to produce any document which he could not be compelled to produce at the trial of an action.” Where a matter has been referred to a *referee*, whether official or special or an officer of the court³ the attendance of witnesses before him may also “be enforced by subpoena.”⁴ Where a matter in bankruptcy is referred to arbitration, the County Court judge has jurisdiction to make an order, and issue a subpoena to compel the attendance of a witness before the arbitrator.⁵ A County Court judge sitting as arbitrator under the Workmen’s Compensation Act, 1897,⁶ or an arbitrator appointed by him under the provisions of the Act, has the same power, for procuring the attendance of witnesses and the production of documents, as if the claims for compensation had been made by plaint in the County Court.⁷

§§ 1298—1309. Besides those applicable to the eight tribunals mentioned above, provisions have been made under which the attendance of witnesses before other tribunals is secured, but it is not practically possible to here enumerate the whole of these.⁸

¹ 52 & 53 V. c. 49. This Act does not extend to Scotland or Ireland. As to the latter, see 3 & 4 V. c. 105, §§ 63 and 64.

² § 8. See also, § 18, sub-sect. 1.

³ R. S. C., Ord. XXXVI. rr. 49, 55 c.

⁴ See R. S. C. 1883, Ord. XXXVI. r. 49.

⁵ Ex parte Bolland, Re Ackary, 1876, 3 Ch. D. 125.

⁶ 60 & 61 V. c. 37.

⁷ Id. 2nd Schedule (4).

⁸ The provisions relating to some of the principal of such tribunals are referred to below in alphabetical order. Those relating to others will be found referred to on a later page (see post, § 1329, note ², p. 944, also §§ 1320—29):—*Barmote Courts in Derby* have, under “The High Peak Mining Customs and Mineral Courts Act, 1851” (14 & 15 V. c. 94), §§ 31,

40, power of compelling the attendance of witnesses very similar to those possessed by the Stannaries Court (which see *infra*). *Councils of Conciliation* have power—under “The Councils of Conciliation Act, 1867” (30 & 31 V. c. 105, § 4, which is not only very obscurely worded, but the forms in the schedule to which have been repealed by 41 & 42 V. c. 79, Sched. I., and in connection with which see 5 G. 4, c. 96 (“The Master and Workman Arbitration Act, 1824”), §§ 2, 9, and Sched.; and 35 & 36 V. c. 46, § 1, sub-sect. 9)—to entertain arbitrations as to certain disputes between masters and workmen, and on any such arbitration, the chairman of the council may summon such witnesses as are required to give evidence, and the arbitrators may examine them upon oath;

§ 1309a. § 1309A. Besides the powers for compelling the actual attendance of witnesses before a court at the trial or hearing which have now

while any witness disobeying such summons is liable to be committed to prison by a justice of the peace. *Courts-Martial, if Military*, are, by "The Army Act, 1881" (44 & 45 V. c. 58, amended by § 25 of "The Army (Annual) Act, 1884," of 47 V. c. 8), § 125, empowered to summon witnesses, the section enacting that "every person required to give evidence before a court-martial may be summoned and ordered to attend in the prescribed manner," the form of the summons, as given in Appendix II. of the Act of 1881, being a document in the nature of an order under the hand of the convening officer, the president of the court, the judge-advocate, or the commanding officer of the prisoner. (R. 77, B. The mode of serving the summons is not prescribed, but the practice is to employ the police for that purpose, and to serve personally.) The Act further provides that if any witness, "subject to military law," makes default in attending, or refuses to take an oath or make a solemn declaration, or refuses to produce any document in his control legally required to be produced, or refuses to answer any question to which an answer may legally be required, or is guilty of contempt, he shall on conviction by a court-martial other than the court to which he has been summoned, be liable, if an officer, to be cashiered, and if a soldier to be imprisoned, or in either case to suffer such less punishment as is mentioned in § 44 of the Act. (See *id.* § 28.) When a witness who is not subject to military law commits any of the above offences, the president of the court-martial, in the event of the witness having been paid or tendered the reasonable expenses of his attendance (the Allowance Regulations, 1881, in pars. 564—573, give the Rules as to the expenses), may certify the offence "to any court of law in the part of her Majesty's dominions where it is committed, which has power to punish witnesses if guilty of like offences in that court;" and thereupon such last court shall

investigate the matter, and if it seem just, punish the offender as if he had committed the offence before itself. (See "Army Act, 1881" (44 & 45 V. c. 58), § 126, sub-sects. 1 and 3.) *Courts-Martial, if Naval*, are empowered by "The Naval Discipline Act, 1866" (29 & 30 V. 109). §§ 61, 66, to require every person, civil, naval, or military, to give evidence, who shall be summoned either by the judge-advocate, or by his deputy, or by the person duly appointed by the president of the court-martial to officiate as judge-advocate at the trial; and all witnesses so summoned who do not attend, or refuse to be sworn or to affirm, or refuse to give evidence, or to answer all such questions as the court may legally demand of them, or prevaricate, are liable to be attached in the Queen's Bench Division of the High Court in London or Dublin, or in the Court of Session in Scotland, or other court of law in any of His Majesty's dominions, in like manner as if they had disobeyed the process of such courts (29 & 30 V. c. 109, § 66); and if the witness belong to His Majesty's navy, the court-martial is, in the event of his non-attendance to give evidence on oath or affirmation, or of his prevarication, also possessed of an alternative power of punishing him by any imprisonment not longer than three months; and to imprison him for any period not exceeding one month, if he be guilty of contempt. (*Id.*) It being further provided, that "every person not subject to this Act, who may be so summoned to attend, shall be allowed and paid his reasonable expenses for such attendance, under the authority of the admiralty, or of the president of the court-martial on a foreign station." (*Id.*) *Factory and Workshop (Accidents) Investigations.* The person or persons appointed by the Secretary of State to hold an investigation of an accident in a factory or workshop under "The Factory and Workshop Act, 1901" (1 Ed. 7, c. 22), § 22, may summon and examine witnesses on oath, and require the production of documents,

been considered, various powers also exist under which certain courts may grant commissions to take the evidence of witnesses, **§ 1309a.**

and any person who without reasonable excuse and after having had the expenses to which he is entitled under the Act tendered to him fails to comply with the summons or requisition is liable to a fine. *Friendly Societies disputes* may be referred to the chief or other registrar, under "The Friendly Societies Act, 1896," and on any such reference the Act gives power to the referee to administer oaths and require the attendance of parties and witnesses, and the production of books and documents; and any person refusing to attend, or to produce any documents, or to give evidence, is guilty of an offence under the Act. (See 59 & 60 V. c. 25, §§ 68, sub-sect. 4, and § 84, sub-sect. (e).) *Irish Land Commissioners* possess all the powers formerly vested in the Chancery Division of the High Court of Justice in Ireland for enforcing the attendance of witnesses after a tender of their expenses, the examination of witnesses orally or by affidavit, the production of documents, the issuing commissions for the examination of witnesses, and the punishing of persons refusing to give evidence or to produce documents, or otherwise guilty of contempt in open court. (See 44 & 45 V. c. 49, § 48, sub-s. 3, Ir.) *Irish Local Government Board, Irish Poor Law Commissioners, and Irish Prison Boards*, and their respective inspectors, may summon persons to give evidence or to produce documents. (See 10 & 11 V. c. 10, §§ 11, 21, and 26; 29 & 30 V. c. 66, § 7; 10 & 11 V. c. 90, §§ 19 and 20; 14 & 15 V. c. 68, §§ 16 and 17; and 40 & 41 V. c. 49, § 23.) *Landed Estates Court, Ireland*: see *Irish Land Commissioners, supra*. "The Land Transfer Act, 1875," empowers the registrar appointed under it, or any of his officers, "authorised by him in writing," to administer oaths, and "by summons under the seal of the office" to require the attendance of witnesses, and the production of documents; and if any person, after the delivery to him of such summons, and the payment or tender of his reasonable

charges, wilfully neglects or refuses to attend, or produce documents, or give evidence, he is liable to a penalty not exceeding 20*l.*, to be recovered on summary conviction (38 & 39 V. c. 87, §§ 109, 110). *The Palatine Court of Chancery of the County Palatine of Lancaster* has powers of compelling witnesses, who live out of the jurisdiction, to attend either before the Court of Chancery of the County Palatine of Lancaster, or before the registrar of that court as well in his capacity of examiner as in that of master, or before any commissioners appointed by that court for the examination of witnesses. (See 13 & 14 V. c. 43, "The Court of Chancery of Lancaster Act, 1850.") *Courts for the Trial of either Parliamentary or Municipal Election Petitions* are empowered to subpoena and swear witnesses, as in a trial at Nisi Prius (see § 31 of 31 & 32 V. c. 125 ("The Parliamentary Elections Act, 1868"), continued till 31st December, 1905, by 4 Ed. 7, c. 29; and see, also, 45 & 46 V. c. 50, § 94, sub-sect. 1), and the judge or presiding barrister has a further power, by order under his hand, of compelling the attendance of any person as a witness who appears to him to have been concerned in the election to which the petition refers (see 31 & 32 V. c. 125 ("The Parliamentary Election Act, 1868"), § 32; and 45 & 46 V. c. 50, § 94, sub-sects. 2, 3); and disobedience of such an order is of course a contempt of court. A judge of such a court may, moreover, examine any person compelled to attend, and also any person in court, though he be not called and examined by any party to the petition (see *id.*); but a person so examined by a judge may be cross-examined by either the petitioner or the respondent, or both. (See *id.*, and also sub-sect. 4 of 45 & 46 V. c. 50, § 94.) The form of an order on a witness to attend, made under these Acts may, it is suggested, be as follows:—"Court for the Trial of an Election Petition [or of a Municipal Election Petition] for [Title] the day of . . . To A. B. [describe

§ 1309a. and may enforce the attendance of the witnesses desired to be examined and the production by them in evidence of any documents which it may be desired to have in evidence.

the person]. You are hereby required to attend before the above court at [place] on the day of , at the hour of [or, forthwith], to be examined as a witness in the matter of the said petition, and to attend the said court until your examination shall have been completed. As witness my hand, M. N., judge of the said court [or A. B., the barrister to whom the trial of the said petition is assigned]." On the subject generally, see Reg.-Gen. of M. T. 1868, r. 21, set out L. R. 4 C. P. 781; and also 37 L. J. C. P. at p. 5; and see, also, Reg.-Gen. of M. T. 1872, r. 41, set out L. R. 7 C. P. 677. "*The Public Worship Regulation Act, 1874*" (37 & 38 V. c. 85), enacts (§ 9) that its judge may enforce the attendance of witnesses and the production of documents in the like manner as a judge of the High Court. (See also Rules, &c., of 22nd February, 1879, made under the Act, and set out L. R. 4 P. D. 250, 261, 283, and also 49 L. J., Order and Rules, pp. 7, 22.) *Revising barristers* are empowered by summonses under their hands, to require the attendance of assessors, overseers, and relieving and other parish officers, who, in the event of disobedience, are liable, upon proof of the service of the summons, to be fined by the barrister any sum not exceeding 5*l.*, nor less than 20*s.* (See 6 & 7 V. c. 18 ("The Parliamentary Voters Registration Act, 1843"), §§ 35, 50, 51; and as to Ireland, 13 & 14 V. c. 69 ("The Representation of the People (Ireland) Act, 1850"), §§ 56, 57.) A similar fine may also now be imposed by a revising barrister upon any person, who, having been summoned under the barrister's hand, to attend at the court and give evidence or produce documents for the purpose of the revision, and having had tendered to him his reasonable expenses,—either fails to attend, or fails to answer any legal question or to produce any document that can be legally required of him. (See

41 & 42 V. c. 26, § 36.) *The Stannaries Court* (technically called "The Court of the Vice-Warden of the Stannaries") enforces the attendance of witnesses before it under provisions which enact, that the service of every writ of subpoena to attend and give evidence hereafter to be issued out of either side of the Court of the Vice-Warden, and served upon any person in any part of England or Wales, shall be as valid and effectual in law, and shall entitle the party suing out the same to all and the like remedies by action or otherwise, as if the same had been served within the jurisdiction of the Court of the Vice-Warden; and that, in case the person so served shall not appear according to the exigency of the writ, the Court of the Vice-Warden, upon oath or affirmation to be taken in open court, or affidavit of the personal service of such writ, may transmit a certificate of such default under the seal of the court, to the Queen's Bench Division of the High Court; and the last-mentioned court shall proceed against, and punish by attachment or otherwise, according to the course and practice of that court, the person so having made default, in such and the like manner as the same court might have done, if such person had neglected or refused to appear in obedience to a writ of subpoena issued to compel the attendance of witnesses out of such last-mentioned court (6 & 7 W. 4, c. 106, being "The Stannaries Act, 1836"), and also that the Queen's Bench Division shall not in any such case as aforesaid, proceed against or punish any person, nor shall any such person be liable to any action for having made default by not appearing to give evidence in obedience to any such writ of subpoena, unless it shall appear to such court that a reasonable and sufficient sum of money to defray the expenses of coming and attending to give evidence, and of returning therefrom, had been tendered to him at the time

§ 1310. The powers which, as it has already been incidentally mentioned (*supra*, § 1285), are possessed by every judge of the High Court, enable him to order¹ witnesses to be examined, or to produce documents, before any officer of the court, or other person appointed, and at any place; and a wilful disobedience² of any such order is a contempt of court. Any person whose attendance shall be so required is³ entitled to the like conduct-money, and payment for expenses, and loss of time, as upon attendance at a trial: and⁴ no person⁵ can be compelled to produce under any such order any document, that he would not be compellable to produce at the hearing or trial. The examiner may, and if need be shall, make a special report to the court touching such examination, and the conduct or absence of any witness or other person thereon; and the court or a judge may direct such proceedings, and make such order as, upon the report, they or he may think just.⁶

§ 1310A. Moreover, when an enquiry respecting the amount of unliquidated damages is directed to be had before an officer of the court, "the attendance of witnesses, and the production of documents before such officer may be compelled by subpoena."⁷

§ 1311. As we also have seen,⁸ the judges of the King's Bench Division of the High Court, whether in England or in Ireland, possess power to grant *writs of mandamus or commissions* to the judges of India, of the colonies, and of other places under his Majesty's dominion, empowering them to examine witnesses in certain cases; and whenever any such commission issues, "the judge or judges, to whom the same shall be directed, shall have the like power to compel and enforce the attendance and examination of witnesses, as the court, whereof they are judges, does or may possess for that purpose in causes or suits depending in such court."⁹

when the writ of subpoena was served upon him. (*Id.* § 10.)

¹ Under R. S. C. 1883, Ord. XXXVII. rr. 5, 7.

² Under r. 8.

³ By r. 9.

⁴ By r. 7.

⁵ An order under this rule will not be made before trial, except in view of a particular motion or other pro-

ceeding. See *Central News Co. v. Eastern News, &c.*, 1884, 53 L. J. Q. B. 236; *Straker v. Reynolds*, 1889, 22 Q. B. D. 262.

⁶ R. S. C. Ord. XXXVII. r. 17.

⁷ R. S. C. Ord. XXXVI. r. 57.

⁸ See *ante*, §§ 500—505.

⁹ § 2 of 1 W. 4, c. 22; and § 67 of 3 & 4 V. c. 105 ("The Debtors (Ireland) Act, 1840").

§ 1312.

§ 1312. While as we have seen,¹ there exists power to order the attendance of a witness who is in one part of the United Kingdom, at the trial of a cause in a court in another part of the United Kingdom, there are also powers of ordering the examination on commission of any such witness. By an Act of the year 1843²—reciting that “there are at present no means of compelling the attendance of persons to be examined under any commission for the examination of witnesses issued by the courts of law or equity in England or Ireland, or by the courts of law in Scotland, to be executed in a part of the realm subject to different laws from that in which such commissions are issued and great inconvenience may arise by reason thereof,”—it is enacted³ that, “if any person, after being served with a written notice to attend any commissioner or commissioners appointed to execute any such commission for the examination of witnesses as aforesaid (such notice being signed by the commissioner or commissioners, and specifying the time and place of attendance), shall refuse or fail to appear and be examined under such commission, such refusal or failure to appear shall be certified by such commissioner or commissioners; and it shall thereupon be competent, to or on behalf of any party suing out such commission, to apply to any of the superior courts of law, in that part of the kingdom within which such commission is to be executed, or any one of the judges of such courts, for a rule or order to compel the person or persons so refusing or failing as aforesaid,⁴ to appear before such commissioner or commissioners, and to be examined under such commission; and it shall be lawful for the court or judge to whom such application shall be made, by rule or order to command the attendance and examination of any person to be named, or the production of any writings or documents to be mentioned, in such rule or order.” § 6 further enacts, that “upon the service of such rule or order upon the person named therein, if he or she shall not appear before such commissioner or commissioners as aforesaid for examination, or to produce the writings or documents mentioned in such rule or order, the disobedience

¹ Supra, § 1262.

² 6 & 7 V. c. 82.

³ § 5.

⁴ Under this enactment there is no

power to make an order on persons not parties to produce documents.

See *Burchard v. Macfarlane*, [1891]

1 Q. B. 408 (C. A.).

§§ 1312,
1313.

to such rule or order shall, if the same shall happen in England or in Ireland, render the person disobeying subject and liable to such pains and penalties as he or she would be subject and liable to by reason of disobedience to a writ of subpoena in England or in Ireland; and if such disobedience shall happen in Scotland, it shall be competent to the Lord Ordinary on the bills, upon an application made to him, by or on behalf of any party suing out such commission, and upon proof of such disobedience made before him, to direct the issue of letters of second diligence, according to the forms of the law of Scotland, to be used against the person disobeying such rule or order." § 7 then provides, that "every person, whose attendance shall be so required, shall be entitled to the like conduct-money and payment of expenses and for loss of time, as for and upon attendance at any trial in a court of law; and that no person shall be compelled to produce under such rule or order any writing or other document that he or she would not be compellable to produce at a trial, nor to attend on more than two consecutive days, to be named in such rule or order." Under the above Act there is no power to make an order for persons not parties to a cause which is depending in one of the courts named in it to attend before commissioners of such court and simply produce documents.¹

§ 1313. In 1856, the Foreign Tribunals Evidence Act² authorised the judges of certain superior courts in England, Ireland, Scotland, and the colonies, on application being made to them on behalf of any foreign court in which any *civil* or *commercial* matter is pending, to order any witnesses within the jurisdiction of their respective courts to attend before, and to be examined by, such persons as shall be named in the order; and the examiners are empowered to administer all necessary oaths.³ This Act further provides, that the witnesses, as at an ordinary trial, shall be entitled to conduct-money and shall be protected from answering criminatory questions, and from producing documents which they are privileged to withhold. The evidence taken in pursuance of this Act, for the purposes of a foreign action, need not

¹ Burchard v. Macfarlane, [1891] 1 Q. B. 408. V. c. 67, Sched. 1.

² 19 & 20 V. c. 113, which may be cited as above described by 41 & 42

³ As to criminal proceedings, see post, § 1315.

§§ 1313—1315a. be limited to what is admissible according to the *English* laws of evidence.¹ The above Act is, by the Extradition Act, 1870,² extended to proceedings for any *criminal* matter which are not of a political character, which may be pending before a foreign court.

§ 1314. In 1859, the Evidence by Commission Act, 1859,³ gave to certain courts in the United Kingdom and in the Colonies reciprocal powers for obtaining evidence the one for the other. This Act, in substance, enacted that whenever any court in his Majesty's dominions shall have authorised, by commission, order, or other process, the obtaining of the testimony of any witness out of its jurisdiction, in or in relation to any action, suit, or proceeding pending in such court, certain superior judges enumerated in the Act shall be empowered,—provided the witness be living within their jurisdiction,—to command his attendance before the appointed commissioners, to order his examination, and to give all other necessary directions on the subject.⁴ The witness, as in the two preceding Acts, may claim the payment of his charges, and the usual protection with respect to the answering of questions and the production of papers.

§ 1315. The Evidence by Commission Act, 1885,⁵ in any proceedings to which the Evidence by Commission Act, 1859, applies, enables any Indian or Colonial court, or judge, to whom the commission, &c., is addressed, to nominate, in civil cases, a fit person,⁶ and in criminal cases a judge or magistrate,⁷ to take the examination of the required witness. The provisions of the Evidence by Commission Act, 1859, are to apply to proceedings under the Act of 1885, now under consideration;⁸ and under both Acts there is a power to make rules.⁹

§ 1315A. County Court judges possess the power of ordering the examination of witnesses out of court, but only in England or Wales,¹⁰ except in cases where the court is exercising a

¹ *Disilla v. Fells & Co.*, 1879, 40 L. T. 423.

² 33 & 34 V. c. 52.

³ 22 V. c. 20, which may be described as above by "The Evidence by Commission Act, 1884" (48 & 49 V. c. 74, § 4). Power to make rules under it is conferred by 48 & 49 V. c. 74, § 5.

⁴ See *Campbell v. Att.-Gen.*, 1867,

L. R. 2 Ch. 571.

⁵ 48 & 49 V. c. 74.

⁶ § 2.

⁷ § 3.

⁸ § 4.

⁹ See § 5, and also § 6 of 22 V. c. 120.

¹⁰ C. C. R. 1903, Ord. XVIII. rr. 18—32.

bankruptcy jurisdiction when the power extends to the ordering a commission abroad.¹ Neither the County Court Rules of 1889, nor those of 1903 have given to a County Court judge a power similar to that exercised by a judge of the High Court, under Ord. XXXVII., rule 5, of the Supreme Court rules, although by sect. 164 of the County Court Act of 1888,² the Rule Committee were empowered to make rules: "extending to all matters of procedure or practice in relation to or concerning the effective operations in law of any procedure or practice in any case within the cognisance of County Courts, as to which rules of the Supreme Court have been or might lawfully be made for cases within the cognisance of the High Courts of Justice."

§§ 1315a
—1316.

§ 1315B. An order for the examination of witnesses abroad can be made by the Mayor's Court of London³ and by an official referee to whom an action has been referred.⁴ An order can also be made where a dispute has been *compulsorily* referred to arbitrations under sect. 162 of the Companies Act of 1862,⁵ but not where parties have agreed to refer their disputes to arbitration, no action having been brought. In the latter case neither the arbitrator nor a judge has any power to make such an order;⁶ the court will not assist "a mere domestic forum."⁷

§ 1316. The provisions securing the attendance of witnesses before magistrates must next be considered. Jervis' Acts (as they are commonly called), passed in the year 1848,⁸ contain clauses which regulate the English law on this subject.⁹ One of the above-named Acts governs the duties of magistrates out of session with respect to *persons charged with indictable offences*, and is called "The Indictable Offences Act, 1848." A section in it enacts¹⁰ that "if it shall be made to appear to any Justice of

¹ § 105, sub-sect. 5 of the Bankruptcy Act of 1883.

² 51 & 52 V. c. 43.

³ § 26 of the Mayor's Court of London Procedure Act.

⁴ *Hayward v. Mutual Reserve Association*, [1891] 2 Q. B., p. 236.

⁵ *Re Mysore West Gold Co.*, 1889, 42 Ch. D., p. 535.

⁶ *Re Shaw and Ronaldson*, [1892] 1 Q. B., p. 91.

⁷ *Per Chitty, J.*, In *re Mysore West Gold Co.*, *ubi supra*.

⁸ 11 & 12 V. c. 42 ("The Indictable Offences Act, 1848"); 11 & 12 V. c. 43 ("The Summary Jurisdiction Act, 1848").

⁹ The mode of enforcing the attendance of witnesses before the inferior courts in *Scotland* is regulated by 27 & 28 V. c. 53, §§ 6, 8, 10, Sched. E. 1 and 2, and Sched. F. 2. With respect to the police courts in *Edinburgh*, see 30 & 31 V. c. 58, Sch. §§ 175, 179—181.

¹⁰ 11 & 12 V. c. 42, § 16.

§ 1316. the Peace by the oath or affirmation of any credible person, that any person within the jurisdiction of such justice is likely to give material evidence for the prosecution, and will not voluntarily appear for the purpose of being examined as a witness at the time and place appointed for the examination of the witnesses against the accused, such justice may and is hereby required to issue his *summons*¹ to such person, under his hand and seal, requiring him to be and appear at a time and place mentioned in such summons before the said justice or before such other justice or justices of the peace for the same county, riding, division, liberty, city, borough, or place, as shall then be there, to testify what he shall know concerning the charge made against such accused party; and if any person so summoned shall neglect or refuse to appear at the time and place appointed by the said summons, and *no just excuse* shall be offered for such neglect or refusal, then (after proof upon oath or affirmation of such summons having been served upon such person, either personally or by leaving the same for him with some person at his last or most usual place of abode) it shall be lawful for the justice or justices, before "whom such person should have appeared, to issue a *warrant*"² under his or their hands and seals, to bring and have such person at a time and place to be therein mentioned before the justice who issued the said summons, or before such other justice or justices of the peace for the same county, riding, division, liberty, city, borough, or place, as shall then be there, to testify as aforesaid, and which said warrant may, if necessary be backed as hereinbefore is mentioned,³ in order to its being executed out of the jurisdiction of the justice who shall have issued the same; or if such justice shall be satisfied by evidence upon oath or affirmation that it is *probable* that such person will not attend to give evidence without being compelled so to do, then, instead of issuing such summons, it shall be lawful for him to issue his *warrant*⁴ *in the first instance*, and which if necessary, may be backed as aforesaid;⁵ and if on the

¹ See form in Sched. to Act, L. 1.

² See Id. L. 2.

³ As to the backing of these warrants, see post, § 1318.

⁴ See form in Sched. to Act, L. 3.

⁵ See post, § 1318.

appearance of such person so summoned before the said last-mentioned justice or justices, either in obedience to the said summons, or upon being brought before him or them by virtue of the said warrant, such person shall refuse to be examined upon oath or affirmation concerning the premises, or shall refuse to take such oath or affirmation, or having taken such oath or affirmation, shall refuse to answer such questions concerning the premises as shall then be put to him, without offering any just excuse for such refusal, any justice of the peace then present, and having there jurisdiction, may by warrant¹ under his hand and seal *commit* the person so refusing to the common gaol or house of correction for the county, riding, liberty, city, borough, or place, where such person so refusing shall then be, there to remain and be imprisoned for any time not exceeding *seven days*, unless he shall in the meantime consent to be examined and to answer concerning the premises.”

§§ 1316—
1318.

§ 1317. The second² of the two Jervis' Acts governs (subject only to a few exceptions to be presently mentioned),³ *summary convictions and orders* by justices out of sessions, and is called “The Summary Jurisdiction Act, 1848.” It contains⁴ similar provisions to those in the other Act which have just been set out for enforcing the attendance of witnesses; with, however, the further provision that, before the justice can issue his warrant for the apprehension of a witness who has disobeyed a summons proof upon oath or affirmation must be given that “a reasonable sum was paid or tendered to the witness for his costs and expenses in that behalf.”

§ 1318. If a witness against whom any warrant shall be issued under either of these Acts shall not be found within the jurisdiction of the justice issuing the same, or, “if he shall escape, go into, reside, or be, or be supposed or suspected to be, in any place, beyond such jurisdiction, whether in England, Wales, Ireland, Scotland, or the Channel Islands,” any justice or other officer, within whose jurisdiction the witness shall be, or be supposed to be, may, “upon proof alone being made on oath of the hand-

¹ See form in Sched. to Act, L. 4.

² 11 & 12 V. c. 43.

³ Post, § 1319.

⁴ 11 & 12 V. c. 43, § 7.

§§ 1318— writing of the justice issuing such warrant," make an indorsement¹
 1319. on the same, authorising its execution within his jurisdiction; and the warrant so backed may then be executed as if it had originally issued in such last-mentioned place.²

§ 1318A. Where a court of summary jurisdiction would have power to issue a summons to a witness, provided he were within its jurisdiction, it may now, if the witness be in England, still issue the summons, though he be out of its jurisdiction; and any court of summary jurisdiction for the place in which the witness is believed to be, may, on proof on oath of the signature of the summons, indorse it; and the witness, on being served with the summons so indorsed, and being paid or tendered a reasonable sum for his expenses, must attend the court on pain of being apprehended.³

§ 1319. The principal summary convictions and orders—which (as just mentioned)⁴ were originally *excepted* from the operation of the Act which in general regulates such summary convictions and orders—were⁵ orders of removal; orders relating to lunatics; and bastardy orders and warrants. Justices may, however, now enforce by summons and warrant the attendance of witnesses on applications for orders of this description.⁶

¹ See form in Sched. K. to 11 & 12 V. c. 42.

² 11 & 12 V. c. 42 ("The Indictable Offences Act, 1848"), §§ 11—16; extended to Scotland by 55 & 56 V. c. 56, § 475; 11 & 12 V. c. 43 ("The Summary Jurisdiction Act, 1848"), §§ 3, 7.

³ 42 & 43 V. c. 49, § 36.

⁴ *Supra*, § 1317.

⁵ See § 35 of 11 & 12 V. c. 43, as amended by Sched. 2 of 42 & 43 V. c. 49 ("The Summary Jurisdiction Act, 1879").

⁶ Under 7 & 8 V. c. 101 ("The Poor Law Amendment Act, 1844"), § 70, which enacts that, "in any proceedings to be had before justices in petty or special sessions, or out of sessions, under the provisions of that Act, or of any of the Acts required to be construed as one Act therewith" [that is, under "The Poor Law Amendment Act, 1844," itself, or under "The Lunacy Act, 1890" (53 V. c. 5); 5 & 6 V. c. 57 ("The Poor

Law Amendment Act, 1842"); 4 & 5 W. 4, c. 76 ("The Poor Law Amendment Act, 1834"); 5 & 6 W. 4, c. 69 ("The Union and Parish Property Act, 1835"); 6 & 7 W. 4, c. 96; 1 & 2 V. c. 25, § 2; 7 W. 4 & 1 V. c. 50; or 2 & 3 V. c. 84 ("The Poor Rate Act, 1839")], "except so far as the provisions of any former Act shall have been expressly altered or amended by the provisions of any subsequent Act, if any party to such proceedings request that any person be summoned to appear as a witness in such proceedings, it shall be lawful for any justice to *summon* such person to appear and give evidence upon the matter of such proceedings; and if any person so summoned neglect or refuse to appear to give evidence at the time and place appointed in such summons, and if proof upon oath be given of personal service of the summons upon such person, and that the reasonable expenses of attendance were paid or

§ 1320. The present Lunacy Acts¹ also contain a clause enabling a "judicial authority" acting under the Acts to enforce the attendance of witnesses. §§ 1320—1324-5.

§ 1321. Various statutes enable the proper authority to inflict a fine upon a witness for non-attendance. Among these "The City of London Sewers Act, 1848,"² for instance, fixes the fine at 20s.³

§ 1322. Notwithstanding the general language of the Acts which empower justices to compel the attendance of witnesses by summons and warrant, they can, in general, only exercise this power within the limits of their own jurisdiction; and whenever the witness lives beyond such limits, recourse must either be had to the cumbrous system of backed warrants,⁴ or of backed summonses,⁵ or else to a subpœna from the Crown Office Department of the Central Office, except in the very few instances where (as in the Acts relating to the excise⁶ and customs⁷) power is expressly given to the justices to issue process beyond their jurisdiction.

§ 1323. In Ireland every court, having by law jurisdiction over criminal offences, upon proof being made of the service, either personally, or at the residence of the person required to attend, of any summons to appear and give evidence in such court touching any offence, has power to impose upon the person so served, in case of his disobeying such summons, such fine as the court shall in its discretion think proper.⁸

§§ 1324-5. Various public bodies, such as boards and commissioners, inspectors, and public officers, are entrusted by statute

tendered to such person, it shall be lawful for such justice, by *warrant* under his hand and seal, to require such person to be brought before him, or any justice before whom such proceedings are to be had; and if any person coming or brought before any such justices in any such proceedings refuse to give evidence thereon, it shall be lawful for such justices to commit such person to any house of correction within their jurisdiction, there to remain without bail or mainprize for any time not exceeding fourteen days, or until such person shall sooner submit himself to be examined; and, in case of such submission, the order of any such justice shall be a sufficient warrant for the discharge of

such person."

¹ 53 V. c. 5, § 9; 54 & 55 V. c. 65. Sched. Like power is given to commissioners and visitors (Id. § 332).

² 11 & 12 V. c. clxiii. § 258.

³ For another instance, see 16 & 17 V. c. 112, § 66 ("The Dublin Hackney Carriage Act").

⁴ Ante, § 1318.

⁵ Ante, § 1318A.

⁶ 7 & 8 G. 4, c. 53 ("The Excise Management Act, 1827"). § 74.

⁷ 39 & 40 V. c. 36 ("The Customs Consolidation Act, 1876"), § 227.

⁸ 1 & 2 W. 4, c. 44, § 8. See further as to the enforcing the attendance of witnesses in Ireland under "The Prevention of Crime (Ireland) Act, 1882" (45 & 46 V. c. 25), §§ 16, 17.

§§ 1324-5 with more or less stringent powers to enforce the attendance of witnesses before them. Only one or two of the most important of these need here be noticed.¹

§ 1826. Commissioners, authorised to inquire into the existence of corrupt practices at elections for members of Parliament, may, by a summons under their hands and seals, or under the hand and seal of one of them, require the attendance of witnesses, and the production of such books, papers, deeds, and writings as they may deem necessary;² and if any such summons be disobeyed, the commissioners may certify the default to one of the superior courts, who will deal with the offender as if he had disobeyed an ordinary subpoena.³

§§ 1827-8. The attendance of persons to give evidence before Masters in Lunacy may, in the matter of any lunatic, be enforced by summons; and every person so summoned is bound to attend as required by the summons.⁴

§ 1829. The modes in which the attendance of witnesses may be enforced are very various.⁵ It would be very useful if a general

¹ See further as to commissioners empowered to try official persons who have been guilty of offences in India, 24 G. 3, c. 25 ("The East India Company's Act, 1784"), §§ 74, 75; 26 G. 3, c. 57 ("The East India Company's Act, 1786"), both amended by "The Statute Law Revision Act, 1888" (51 V. c. 3); as to examiners appointed to take depositions *de bene esse*, 24 G. 3, c. 25 ("The East India Company's Act, 1784"), § 81, and 42 G. 3, c. 85, § 3.

² 15 & 16 V. c. 57 ("The Election Commissioners Act, 1852"), § 8; 31 & 32 V. c. 125, §§ 15, 56, continued till 31st Dec. 1905, by 4 Ed. 7, c. 29.

³ 15 & 16 V. c. 57 ("The Election Commissioners Act, 1852"), § 12.

⁴ 53 V. c. 5, § 114.

⁵ Several of the cases in which the attendance of witnesses can be enforced have been already enumerated, see note to §§ 1293-1309. In addition to the instances there specified, the attendances of witnesses may also be enforced in the following cases:—*Charities*.—Commissioners and inspectors under the Charitable

Trusts Acts of 1853 and 1855 (see and compare 16 & 17 V. c. 137, §§ 10-14, and 18 & 19 V. c. 124, §§ 6-9), and Assistant Charity Commissioners, who now, under "The Endowed Schools Act, 1874" (37 & 38 V. c. 87), § 1, exercise the powers originally conferred on the commissioners and assistant commissioners under "The Endowed Schools Act, 1869" (32 & 33 V. c. 56), § 49, and the commissioners under "The City of London Parochial Charities Act, 1883" (46 & 47 V. c. 36), § 2, possess powers for enforcing the attendance of particular witnesses. The *Customs Board*, under "The Customs Consolidation Act, 1876" (39 & 40 V. c. 36), §§ 36, 37, whenever it is necessary, and their officers, may institute an inquiry relating to any business under their management, and are, on such inquiry, empowered to summon any person required as a witness to appear before them and to give evidence on oath; and if such person, having his reasonable expenses tendered to him, refuses to attend, or otherwise misbehaves, he renders himself

Act were passed rendering the procedure clear, simple, and uniform. § 1329.

liable to a penalty of five pounds. *Endowed Schools*. See "*Charities*." *Fisheries (Ireland)*.—Special commissioners are, by "The Salmon Fishery (Ireland) Act, 1863" (26 & 27 V. c. 114, § 38, Ir.), as amended by "The Fisheries (Ireland) Act, 1869" (32 & 33 V. c. 92, Ir.), intrusted with very peculiar powers; and for the purpose of enforcing the attendance of witnesses, and the production of deeds, books, papers, and documents, they have all such rights as the judges of the King's Bench in Ireland have for the like purpose. As to *Inclosures*, the Board of Agriculture, or any officer of the board for the time being assigned for that purpose, may, by summons under the seal of the board, or under the hand of such officer, require the attendance of witnesses before themselves, or, if the summons be under seal, before the valuer; and every such witness in case of disobedience, or other misconduct in refusing to be sworn or to give evidence, is liable to a penalty not exceeding ten pounds, to be levied and recovered before two justices of the county in which the land to be inclosed is situate; and he will also be deemed guilty of misdemeanor; but he must be paid or tendered the reasonable charges of his attendance, and he need not travel above ten miles from the place of his abode (8 & 9 V. c. 118 ("The Inclosure Act, 1845"), §§ 9, 39, 40, 159, 164; 52 & 53 V. c. 30 ("The Board of Agriculture Act, 1889"), §§ 2, 11; see, also, 41 G. 3, c. 109 ("The Inclosure (Consolidation) Act, 1801"), §§ 33, 34). *The Local Government Board for England*, in whom all the powers of the late English Poor Law Board are now vested (34 & 35 V. c. 70 ("The Local Government Board Act, 1871"), § 2), and *the Local Government Board for Ireland*, who now represent the late Irish Poor Law Commissioners (35 & 36 V. c. 69 ("The Local Government Board (Ireland) Act, 1872"), § 5, Ir.), and the inspectors respectively appointed by these bodies, may summon any

person for the purpose of being examined upon any matter under their control, or of producing or verifying any document relating to such matter; and in the event of such person disobeying such summons, or refusing to give evidence, or wilfully altering, suppressing, concealing, destroying, or refusing to produce any such document, he shall be deemed guilty of misdemeanor; but no person shall be required to travel more than ten miles in England or twenty miles in Ireland from his place of abode; and if he be summoned by an English inspector he shall be allowed his expenses. (See 10 & 11 V. c. 109 ("The Poor Law Board Act, 1847"), §§ 11, 21, 26; 29 & 30 V. c. 66 ("The New Forest Poor Act"), § 7; 10 & 11 V. c. 90 ("The Poor Relief (Ireland) Act, 1847"), §§ 19, 20, Ir.; 14 & 15 V. c. 68 ("The Poor Relief (Ireland) Act, 1851"), §§ 16, 17, Ir.) *The Prisons (Ireland) Board* (otherwise the General Prisons Board for Ireland) possesses similar powers to those of the Local Government Board for Ireland. (See 40 & 41 V. c. 49 ("The General Prisons (Ireland) Act, 1877"), § 11, Ir.) "*The Preliminary Inquiries Act, 1851*" (14 & 15 V. c. 49), §§ 4, 5, empowers the inspectors appointed by the Lords Commissioners of the Admiralty to summon any person whose evidence in their judgment shall be material; and if such person wilfully neglects or refuses to attend in pursuance of such summons, or to produce such documents as they may under the Act be required to produce, they become liable to a penalty not exceeding five pounds. *Railway Commissioners and Assistant Commissioners*, acting under "The Regulation of Railways Act, 1873" (36 & 37 V. c. 48), §§ 21, 25, and the inspectors and courts holding investigations under "The Regulation of Railways Act, 1871" (34 & 35 V. c. 78), §§ 4, 7, 11, 15, have also powers for enforcing the attendance of witnesses. *Sewers Commissioners* may, when landowners refuse to treat with them, issue their warrants

§§ 1330—
1330b.

§ 1330. Witnesses are absolutely protected from any action for defamation with respect to such statements as they may make in the course of a judicial proceeding, and cannot be sued for them even if it be alleged that they are malicious.¹

§ 1330A. Moreover, witnesses, in common with parties, barristers, solicitors, and, in short, all persons who have that relation to a suit which calls for their attendance,² are *protected from arrest* upon any civil process while going to the place of trial, while attending there for the purposes of the cause, and while returning home;³ *eundo, morando, et redeundo*.⁴ Arrest in civil process, either on mesne process to hold to bail, or by way of execution after judgment (formerly effected by the old writ of *ca. sa.*) has been abolished, and this makes the subject of far less importance than it formerly was. Still, as under some circumstances a power of arrest in the course of civil process still exists, the law by which it is governed cannot properly be omitted.

§ 1330B. To afford a witness the privilege of the immunity

to the sheriff to empanel a compensation jury to attend the sessions; and thereupon the clerk of the peace, or his deputy, shall summon all such persons as shall be thought necessary to be examined as witnesses, who, if they do not appear, or if they refuse to be sworn or to be examined, without lawful excuse to be allowed by the sessions, shall forfeit a sum not exceeding five pounds for every such offence by 3 & 4 W. 4, c. 22 ("The Sewers Act, 1833"), §§ 26, 27. § 29 provides by whom the costs of the witnesses are to be paid. See 4 & 5 V. c. 45 ("The Sewers Act, 1841"), §§ 13, 14. As to *Ships*, every Board of Trade inspector appointed under the Merchant Shipping Act, 1894, may, by summons under his hand, require the attendance of witnesses before him; and every person who refuses to obey such summons, after having his expenses tendered to him, becomes liable to a fine not exceeding ten pounds (57 & 58 V. c. 60, §§ 464, 465, 729).

¹ *Seaman v. Netherclift*, 1876, 1 C. P. D. 540 (C. A.); *Revis v. Smith*, 1856, 29 L. J. C. P. 195; *Henderson v. Broomhead*, 1859, 28 L. J. Ex. 360; *Kennedy v. Hilliard*, 1859, 10 Ir.

C. L. R. 195; *Gildea v. Brien*, 1821, 10 Ir. C. L. R. 230; *Dawkins v. Id. Rokeby*, 1875, L. R. 8 Q. B. 255 (H. L.); *Goffin v. Donnelly*, 1881; *Barratt v. Kearns*, [1905] 1 K. B. 504. As to what tribunals confer the privilege, see cases above cited; *Royal Aquarium v. Parkinson*, [1892] 1 Q. B. 431; and cases cited *post*, § 1334.

² The privilege has been held not to apply to a solicitor's clerk attending at judge's chambers: *Phillips v. Pound*, 1852, 21 L. J. Ex. 277.

³ Gr. Ev. § 316, slightly, as to six lines.

⁴ See Cons. Ord. Ch. 1860, Ord. XLIII. r. 1, which, however, is repealed by R. S. C. 1883. No rule has been substituted for it.

⁵ *Meekins v. Smith*, 1791, 1 H. Bl. 637; *Walpole v. Alexander*, 1782, 3 Doug. 45. In *Ex parte Britten*, 1840, 1 Mon. D. & D. 278, the husband of a petitioner, who accompanied his wife to the Court of Review to attend the hearing of the petition, was held privileged from arrest; since, being liable to costs of the application, he had a relation to the suit justifying his attendance.

from arrest which has been described, the service upon him of a subpoena or other process is not necessary, provided the witness has consented to come without such service,¹ and, in good faith, actually attends.² The privilege even extends to a witness coming from abroad without a subpoena.³ In determining what constitutes a reasonable time for going, staying, and returning, the courts are disposed to be liberal: and provided it substantially appears that there has been no improper loitering or deviation from the way, they will not strictly inquire whether the witness or other privileged party went as quickly as possible and by the nearest route.⁴

§§ 1330b.
1331.

§ 1331. Accordingly, the rule of protection has been held to apply where a witness, two hours after he left the court, was arrested about a mile off in the direct road to his house;⁵ where a defendant, having attended his cause in the morning, went in the afternoon to a tavern near the court to dine with his attorney and witnesses;⁶ where a party who had been staying for some days at a coffee-house near the court, waiting for the trial of a cause, which was a remanet, was arrested on a day on which such cause was not in the list for the day;⁷ where a party attending an arbitration was arrested during an adjournment of the reference from one period to another of the same day;⁸ where a witness, in a cause tried on a Friday afternoon, was arrested in the assize town on Saturday evening, when entering a conveyance to take her home;⁹ where a plaintiff, on leaving court, called at his office for refreshment, and then on his way

¹ *Arding v. Flower*, 1800, 8 T. R. 356; *Ex parte Byne*, 1813, 1 Ves. & B. 320; *Rishton v. Nisbett*, 1834, 1 M. & Rob. 347; *Magnay v. Burt*, 1843, Dav. & M. 652, *contra*, however. See, also, *Salk*. 544.

² *Meekins v. Smith*, 1791, 1 H. Bl. 637; *Walpole v. Alexander*, 1782, 3 Doug. 45.

³ *Walpole v. Alexander*, 1782, 3 Doug. 45; *Norris v. Beach*, 1807, 2 Johns. 294 (Am.).

⁴ *Strong v. Dickenson*, 1836, 5 L. J. Ex. 231; *Ricketts v. Gurney*, 1819, 7 Price, 704; *Willingham v. Matthews*, 1815, 6 Taunt. 358; *In re M'Kone*, 1841, Ir. Cir. R. 65; *Smythe v. Banks*, 1797, 4 Dall. 329 (Am.).

⁵ *Selby v. Hills*, 1832, 1 L. J. C. P. 55. See *Ex parte Clarke*, 1832, 2 Dea. & C. 99.

⁶ *Lightfoot v. Cameron*, 1776, 2 W. Bl. 1113.

⁷ *Childerston v. Barrett*, 1809, 11 East, 439; *Hurst's case*, 1804, 4 Dall. 387 (Am.).

⁸ *Ex parte Temple*, 1814, 2 Ves. & B. 395; *Ex parte Russell*, 1812, 1 Rose, 278.

⁹ *Holiday v. Pitt*, 1814, 2 Str. 986. "There she was directly on her way home. The court did not decide that she might not have been arrested at the assize town on Saturday morning": *Alderson, B.*, in *Strong v. Dickenson*, 1836, 5 L. J. Ex. 231.

**§§ 1331,
1332.**

home went to his tailor's, in whose shop he was arrested;¹ and even where a witness from abroad, on finding that the trial was postponed till the next sittings, determined to wait till it came on, and was arrested on the eighth day after his arrival.²

§ 1332. On the other hand, the courts have refused to discharge the party out of custody in the cases following, viz., where a witness, subpœnaed out of Chancery, was arrested three days before the time fixed for his examination, while going to his solicitor's office to look at the interrogatories which he would be called upon to answer;³ where a party having come from the country to town to attend an arbitration, remained, after an adjournment of the reference sine die, till the expiration of the fourth day of an approaching term, in the expectation of a motion being made by the opposite party relative to the order of reference;⁴ and where a solicitor, having been arrested during the afternoon at the Auction Mart Coffee House, swore that, having professional business in several causes at Westminster, he had gone into the City on his way to the courts, though he had omitted to state either where his house was, or when he left home.⁵ So, though it seems that a witness who comes to town to be examined, is protected from arrest during the whole time that he bonâ fide remains there for the purpose of giving evidence,⁶ a witness living in London is not protected in the interval between the service of the subpœna and the day appointed for his examination.⁷ Neither can the privilege from arrest be prolonged, in consequence of the party's inability to return home for want of pecuniary means,⁸ though possibly, if the detention has been caused by illness, the court will consider this circumstance in fixing the extent of the protection.⁹ In one case, where a party in London, being summoned to attend a

¹ *Pitt v. Coomes*, 1834, 5 B. & Ad. 1078; *Luntly v. —*, 1833, 1 C. & M. 579; *Abearne v. M'Guire*, 1840, 2 Ir. Eq. R. 437; *Mahon v. Mahon*, 1840, 2 Ir. Eq. R. 440.

² *Walpole v. Alexander*, 1782, 3 Doug. 45. See, also, *Persse v. Persse*, 1856, 5 H. L. C. 671.

³ *Gibbs v. Phillipson*, 1829, 1 Russ. & Myl. 19.

⁴ *Spencer v. Newton*, 1837, 6 A. &

E. 623.

⁵ *Strong v. Dickenson*, 1836, 5 L. J. Ex. 231. See *Walsh v. Wilson*, 1851, 1 Ir. Ch. R. 610.

⁶ *Gibbs v. Phillipson*, 1829, 1 Russ. & Myl. 19.

⁷ *Id.*

⁸ *Spencer v. Newton*, 1837, 6 A. & E. 623.

⁹ *Spencer v. Newton*, 1837, 6 A. & E. 623.

reference at Exeter, went, three days before the time of meeting, with his attorney to Clifton, where his wife lived, to examine documents necessary to be produced before the arbitrator, and was arrested on the second day, before he had completed the arrangement of his papers, the King's Bench held that he was not, but the Exchequer that he was, privileged from arrest.¹

§ 1833. This protection, however, extends only to arrest on *civil process*, for against criminal process home itself is no protection.² For this purpose an attachment against a solicitor, for contempt by disobeying an order of the court, is not regarded as "civil process," though an attachment on an ordinary suitor for nonpayment of money will be so considered.³ Whether a warrant of commitment issued out of a County Court would for such purpose be regarded as criminal process, has, after discussion, been left undecided.⁴ In Ireland, where a witness, attending at Quarter Sessions, was arrested under a writ of commission of rebellion, the court out of which the process issued, while declining to express any opinion as to whether this writ was in the nature of a criminal proceeding, discharged the witness from custody, observing that it was highly essential to the interests of the public, that witnesses in criminal courts of justice should be protected and encouraged.⁵ A witness is not privileged from being taken by his bail, even during attendance at court, for this is not an arrest, but a retaking.⁶

§ 1834.⁷ This privilege of witnesses will be recognised in all cases where the attendance is given in any matter pending before a *lawful tribunal* having jurisdiction of the cause.⁸ Accordingly

¹ *Randall v. Gurney*, 1819, 3 B. & Ald. 252 (Abbott, C.J., diss.); *Ricketts v. Gurney*, 1819, 7 Price, 699 (Graham and Wood, BB.; Garrow, B., diss.).

² *Ld. Denman*, *In re Douglas*, 1842, 12 L. J. Q. B. 49, where a warrant issued upon an information *ex officio*, under the Act of 33 G. 3, c. 52, § 62, and expressed to be to answer for certain misdemeanors whereof the party was impeached, and also for certain penalties sued for by the Att.-Gen., was held to be criminal process, under which the party might be taken *redeundo* after

discharge from illegal custody.

³ *In re Freston*, 1883, 11 Q. B. D. 545 (C. A.); and cases there cited; *Harvey v. Harvey*, 1884, 26 Ch. D. 644.

⁴ *Kimpton v. Lond. & N. West. Rail. Co.*, 1854, 23 L. J. Ex. 232.

⁵ *Graves v. M'Carthy*, 1838, *Crawf. & D. Abr. C.* 127.

⁶ *Ex parte Lyne*, 1822, 3 Stark. R. 132; *Horne v. Swinford*, 1822, 1 D. & R. Mag. Cas. 361 (Richards, C.B.).

⁷ *Gr. Ev.* § 317, in part.

⁸ *Ex parte Cobbett*, 1857, 7 E. & B. 959 (Crompton, J.).

§§ 1334,
1335.

it extends to parties and witnesses attending before an arbitrator, whether he be appointed by an order of the High Court, or of a judge, or by an agreement of reference containing a clause that it may be made a rule of court, since in all these cases the attendance of witnesses may be enforced;¹ it applies to a party attending at judge's chambers,² or before a Master or an examiner of the High Court,³ or at the Registrar's office on passing the minutes of a decree,⁴ or before the under-sheriff on the execution of a writ of inquiry;⁵ as also to witnesses attending the Central Criminal Court,⁶ the Court of Bankruptcy,⁷ a Coroner's Court,⁸ Courts-Martial, whether military,⁹ marine,¹⁰ or naval,¹¹ the Houses of Parliament, or committees of either House.¹² It will also protect a prosecutor attending Quarter Sessions¹³ or Assizes,¹⁴ even after the bill in which he is interested has been ignored, provided this fact has not been publicly announced.¹⁵ But a meeting of the London County Council for granting music and dancing licenses would not confer the privilege, as such Council is not a judicial tribunal.¹⁶

§ 1335. The privilege extends to a witness who attends before a *magistrate* or other inferior judicial officer by virtue of a summons or a writ of *subpœna*, *eundo*, *morando*, *et redeundo*;¹⁷

¹ *Moore v. Booth*, 1797, 3 Ves. 350; *List's case*, 1814, 2 Ves. & B. 374; *Ex parte Temple*, 1814, 2 Ves. & B. 395; *Randall v. Gurney*, 1819, 3 B. & Ald. 252; *Webb v. Taylor*, 1843, 13 L. J. Q. B. 24; *Rishton v. Nisbett*, 1834, 1 M. & Rob. 347; *Spence v. Stewart*, 1802, 3 East, 89; *Sanford v. Chase*, 1824, 3 Cowen, 381 (Am.).

² *Moore v. Booth*, 1797, 3 Ves. 350, 351; *In re Jewitt*, 1864, 33 L. J. Ch. 730.

³ *Id.*; *Wheeler v. Cox*, 1841, 3 Ir. L. R. 302, n.; *Brown v. M'Dermott*, 1840, 2 Ir. Eq. R. 438.

⁴ *Newton v. Askew*, 1848, 6 Hare, 319.

⁵ *Walters v. Rees*, 1819, 4 Moore, C. P. 34.

⁶ *Newton v. Constable*, 1841, 2 Q. B. 162.

⁷ *Arding v. Flower*, 1800, 8 T. R. 534; *Ex parte King*, 1802, 7 Ves. 312; *Ex parte Clarke*, 1832, 2 Dra.

& C. 99; *Ex parte Burt*, 1842, 2 Mon. D. & D. 666; *Willingham v. Matthews*, 1815, 6 Taunt. 356; *Andrews v. Martin*, 1862, 12 C. B. (n.s.) 371.

⁸ *Thomas v. Churton*, 1862, 31 L. J. Q. B. 139.

⁹ 44 & 45 V. c. 58, § 125, subsect. 2.

¹⁰ *Id.*, § 179.

¹¹ 29 & 30 V. c. 109, § 66.

¹² *Goffin v. Donnelly*, 1881, 6 Q. B. D. 307; *May, L. of Parl.* 149—151. and the journals there cited.

¹³ See *R. v. Skinner*, 1772, *Lofft*. 55; *Munster v. Lamb*, 1883, 11 Q. B. D. 588.

¹⁴ *Graves v. M'Carthy*, 1838, *Crawf.* & D. Abr. C. 127 (Ir.).

¹⁵ *In re M'Kone*, 1841, Ir. Cir. R. 65.

¹⁶ *Royal Aquarium v. Parkinson*. [1892] 1 Q. B. 431 (C. A.).

¹⁷ See *Webb v. Taylor*, 1843, 13 L. J. Q. B. 24; *Mountague v. Harri-*

and also to a person attending before a police magistrate as a witness on a charge of felony after a remand, though he was not under recognisance or summons to appear;¹ but not to a common informer, nor to a person who voluntarily goes before a justice to obtain a summons against another party for penalties, even though the summons be obtained;² nor to a barrister who attends at Petty Sessions for the purpose of obtaining practice;³ and some doubt has been expressed whether the privilege can be extended further than to protect the bar while attending the Superior Courts, and perhaps counsel before inferior tribunals actually engaged in professional business.⁴

§ 1836. A party discharged from illegal civil process is privileged from arrest during his return home.⁵ But *discharge from criminal process*, even in consequence of an acquittal, confers no such protection, unless it should appear that the apprehension on the criminal charge was a mere contrivance to get the party into custody in the civil suit.⁶ In Ireland, it has been held that a person who attends *under a recognisance* to answer a criminal charge, and is acquitted and discharged, is privileged from arrest while returning home.⁷ The validity of the distinction between persons surrendering to bail and those in custody may well be questioned, since an accused, who surrenders to take his trial, is, during that trial, as much in legal custody as a prisoner who is brought up by a gaoler.

§ 1837. If a person entitled to privilege be *unlawfully arrested*, application for his *discharge* can be made, either to the court

son, 1857, 27 L. J. C. P. 24; *Ex parte Edme*, 1822, 9 Serg. & R. 147 (Am.).

¹ *Mountague v. Harrison*, 1857, 27 L. J. C. P. 24.

² *Ex parte Cobbett*, 1857, 7 E. & B. 959.

³ *Newton v. Constable*, 1841, 2 Q. B. 162.

⁴ See observations of Denman, C.J., in giving judgment of court in *Newton v. Constable*, 1841, 2 Q. B. 162, which were made notwithstanding *Luntly v. —*, 1833, 1 C. & M. 579; noticed 2 Q. B. 165; and 6 & 7 W. 4, c. 14, § 2, empowering persons liable to summary conviction to make their defence before justices

by counsel or solicitors.

⁵ In *re Douglas*, 1842, 12 L. J. Q. B. 49 (Ld. Denman); *R. v. Blake*, 1832, 4 B. & Ad. 355.

⁶ *Goodwin v. Lordon*, 1835, 1 A. & E. 378; *Hare v. Hyde*, 1851, 20 L. J. Q. B. 185; *Anon.*, 1832, 1 Dowl. 157; *Buckmasters v. Cox*, 1839, 2 Ir. L. R. 101; *Jacobs v. Jacobs*, 1834, 3 Dowl. 677; In *re Douglas*, 1842, 12 L. J. Q. B. 49.

⁷ *Callans v. Sherry*, 1832, Alc. & Nap. 125 (Ir.); *Kelly v. Barnewall*, 1834, Cooke & Alc. 94 (Ir.); *Williams v. Steele*, 1835, 4 Law Rec. (1st series) 169 (Ir.); *Babington v. Mahony*, 1837, 5 Law Rec. (2nd series) 232 (Ir.).

§§ 1337—1339. — where the cause is depending, in respect of which the privilege is claimed, or to the court out of which the process issued, upon which the arrest takes place.¹ Though the one court should refuse to interfere, the person arrested may seek relief from the other.² Moreover, without applying to either of these courts, the arrested party may obtain his discharge by causing himself to be brought by habeas corpus before any one of the superior judges at chambers.³ This last appears, indeed, to be the proper course to pursue, whenever the witness has been actually lodged in gaol, and made to appear to give evidence in court by a writ of habeas corpus ad testificandum.⁴

§ 1388. The Houses of Parliament will, of their own authority, respectively discharge all persons duly arrested, while attending before such Houses, or before committees of either House.⁵ Witnesses summoned to give evidence before military, marine, or naval courts-martial, must, however, in the event of their arrest, apply by affidavit for their discharge either to the court out of which the process issued, or if such court be not sitting, to some judge of the Queen's Bench Division in England or Ireland, or to the Court of Session in Scotland, or to the courts of law in the East or West Indies, or elsewhere, as the case shall require.⁶

§ 1399. It is not yet clearly determined, *within what time* the motion for discharge must be made, or how far the witness

Att.-Gen. v. Skinners' Co., 1837, Cooper, C. P. 1; Kimpton v. Lond. & N. West. Rail. Co., 1854, 23 L. J. Ex. 232; Randall v. Gurney, 1819, 3 B. & Ald. 252; Ex parte Clarke, 1832, 2 Dea. & C. 99; Ex parte Burt, 1842; Walker v. Webb, 1797, 3 Anstr. 941; Selby v. Hills, 1832, 8 Bing. 166; Bours v. Tuckerman, 1811, 7 Johns. 538 (Am.).

² Randall v. Gurney, 1819, 3 B. & Ald. 255.

³ Ex parte Tillotson, 1816, 1 Stark. R. 470; Towers v. Newton, 1841, 10 L. J. Q. B. 106 (Rolfe, B., after consulting Parke, B.). See Newton v. Constable, 1841, 2 Q. B. 162.

⁴ For the judge at Nisi Prius has no means of ascertaining whether proper grounds of detention exist, and therefore will not interfere: Astbury v. Belbin, 1850, 3 C. & K.

20 (Ld. Campbell). And inferior tribunals, — such as the quarter sessions (Clerk v. Molineux, 1664, T. Ray. 100), arbitrators (Walters v. Rees, 1819, 4 Moore, C. P. 34), or the Sheriffs' Courts (Id.; Wilson v. Sheriffs of London, 1620, Brownl. 15)—have no power to discharge arrested persons, unless they be arrested in the very face of the court: Wilson v. Sheriffs of London, 1620, Brownl. 15.

⁵ May, L. of Parl. 149—151; but think fit, to the court out of which the process issued: Att.-Gen. v. Skinners' Co., 1837, Coop. C. P. 1.

⁶ See 44 & 45 V. c. 58 ("The Army Act, 1881"), § 125; 29 & 30 V. c. 109 ("The Naval Discipline Act, 1866"), § 66.

arrested may *waive* his protection. In America the protection is regarded as a personal privilege, and the party arrested may waive it; so that, if he willingly submits to be taken into custody, he cannot afterwards object to the imprisonment as unlawful.¹ In Ireland the privilege is considered as bestowed for the good of the public; but the application for discharge must be made without delay.² In this country the courts hold (as in Ireland) that the privilege is not the privilege of the *person* attending the court, but of the *court* which he attends, it being established for the benefit of the suitors and the advancement of justice;³ and they, consequently, appear to consider that a prisoner cannot, by laches, preclude himself from taking advantage of the illegality of his arrest; and that it is immaterial what interval may have been allowed to elapse between the arrest and the application for discharge, unless, perhaps, in a case where the interests of another party have been prejudiced by the delay.⁴ The allowance, however, or the disallowance of the privilege, is always discretionary; it is sometimes, therefore, clogged with conditions;⁵ and it has been disallowed in collusive, as well as vexatious, actions.⁶

§§ 1339,
1340.

§ 1340. No *action* is maintainable against an officer for arresting a person while privileged as a witness; and this, too, though it be alleged and proved that the arrest was made maliciously, and with ample knowledge of the circumstances.⁷ Nor will an action lie against the plaintiff or against his solicitor, by whom the officer was entrusted with the execution of the writ;⁸ at any rate if the

¹ *Brown v. Getchell*, 1814, 11 Mass. 11, 14 (Am.); *Geyer v. Irwin*, 1790,

⁴ *Dall* 107 (Am.).

² *In re ———*, 1841, 3 Ir. L. R. 301.

³ *Anon.*, 1832, 1 Dowl. 157; *Magnay v. Burt*, 1843, Dav. & M. 652; *Cameron v. Lightfoot*, 1777-8, 2 W. Bl. 1193.

⁴ *Webb v. Taylor*, 1843, 13 L. J. Q. B. 24 (Patteson, J.), where 23 days had elapsed; *Andrews v. Martin*, 1862, 12 C. B. (N.S.) 371 (Willes, J.), where the application was delayed for six months. See *Greenshield v. Pritchard*, 1841, 10 L. J. Ex. 295, where, after the lapse of a year, the

court refused to interfere, though the arrest had been made under void process.

⁵ *Andrews v. Martin*, 1862, 12 C. B. (N.S.) 371.

⁶ *Magnay v. Burt*, 1843, Dav. & M. 652; *Cameron v. Lightfoot*, 1777-8, 2 W. Bl. 1190; *Anon.*, 1670, 11 Mod. 79.

⁷ *Magnay v. Burt*, 1843, Dav. & M. 652; *Cameron v. Lightfoot*, 1777-8, 2 W. Bl. 1190; *Tarleton v. Fisher*, 1781, 2 Doug. 671.

⁸ *Yearsley v. Heane*, 1845, 14 M. & W. 322; *Ewart v. Jones*, 1845, 14 M. & W. 774.

§§ 1340—1341a. execution of the process they have enforced took place without full knowledge on their parts of the privilege of the witness.¹ Whether the fact of knowledge and the proof of actual malice will make any difference is, indeed, doubtful. It has been held at *Nisi Prius*, that under these circumstances an action is maintainable,² but this ruling is scarcely reconcilable with the doctrines laid down by the Exchequer Chamber in a later case.³ But if a witness, who has been improperly arrested, obtains an order from the court for his discharge, and an officer disobeys this order, an action may, as it seems, be brought against such officer; for the further detention of the witness, without the authority of any writ to justify it, becomes a new trespass and false imprisonment, in the same manner as if there had been a new caption.⁴

§ 1341. Although the witness arrested has no remedy by action, the party arresting him maliciously, and with a knowledge of the existence of his privilege, may have an *attachment* issued against him for contempt of court.⁵

§ 1341A. The preventing, or using any means to prevent, a witness duly summoned from attending court, is punishable as a contempt,⁶ as also is offering him money with a view to influence his evidence.⁷ So also is the use of threatening language to any person cognizant of facts in issue in a suit, with the view of preventing him from giving testimony at the hearing.⁸ Again, any public and calumnious attack on persons who are expected to be witnesses in a pending trial, is a contempt of the highest order as tending to pollute the source of justice;⁹ and any endeavour to intimidate a witness from giving evidence in a prosecution, is indictable as a misdemeanor.¹⁰

¹ *Stokes v. White*, 1834, 1 C. M. & R. 223.

² *Whalley v. Pepper*, 1836, 7 C. & P. 506 (Littledale, J.). See *Ewart v. Jones*, 1845, 14 M. & W. 774 (Pollock, C.B.); *sed qu.*

³ *Magnay v. Burt*, 1843, Dav. & M. 652. See, also, *Vandeveldt v. Lluellin*, 1661, 1 Keb. 220.

⁴ *Magnay v. Burt*, 1843, as reported 5 Q. B. 395 (Tindal, C.J.).

⁵ *Cameron v. Lightfoot*, 1777-8, 2 W. Bl. 1190; *Vandeveldt v. Lluell-*

lin, 1661, 1 Keb. 220; *Magnay v. Burt*, 1843, 5 Q. B. 381.

⁶ *Com. v. Feely*, 1789-1826, 2 Virg. Cas. 1 (Am.).

⁷ *In re Hooley*, 1898, 79 L. T. 306.

⁸ *Shaw v. Shaw*, 1862, 31 L. J. P. & M. 35.

⁹ *R. v. Onslow and Whalley*, 1873, 12 Cox, C. C. 358.

¹⁰ *R. v. Loughran*, 1839, 1 *Crawf. & D. C. C.* 79 (Ir.). See, also, 27 G. 3, c. 15, § 8 (Ir.).

§ 1341b. It will also perhaps be deemed a contempt, to serve a writ of summons upon a witness in the immediate or constructive presence of the court;¹ though a writ so served cannot be set aside for irregularity.² § 1341b.

¹ *Cole v. Hawkins*, 1738, Andr. C. C. B. 41 (Am.); *Miles v. M'Cullough*, 1803, 1 Binn. 77 (Am.).
² *Poole v. Gould*, 1856, 25 L. J. Ex. 250. See, also, *Blight v. Fisher*, 1809, 1 Pet. 250.

CHAPTER II.

THE COMPETENCY OF WITNESSES.

§§1342-3. §§ 1342-3. The rule as to the Incompetency of witnesses which existed by the common law of England regarded all persons who stood convicted of serious crime as not to be trusted to speak the truth, and also held all persons who were interested in the result of a civil or criminal trial, either as parties or as the husbands or wives of parties, to be incompetent to give evidence on such trial,¹ presuming that such persons were more likely to commit perjury than to tell the truth to their own disadvantage. In civil cases this common law rule of Incompetency has been, as we shall see, long ago removed by statute. The great majority of lawyers long ago came to the conclusion that it ought also to be removed in criminal cases, even if its removal should result in the conviction of some guilty persons who otherwise might escape being convicted because their own mouths were closed,—since the ascertainment of truth ought to be the great object aimed at in all courts of justice. The dread felt by some political organisations lest the examination of prisoners upon oath should lead to inconvenient revelations both as to their objects and as to the means by which they sometimes seek to attain them, was also the origin of some opposition to any alteration in the criminal law as to the competency of prisoners and their husbands and wives to give evidence. The much needed change in the law has, however, now been effected, and by the Criminal Evidence Act, 1898,² every person charged with an offence, and the wife or husband, as the case may be, of the person charged, are now competent witnesses for the defence at every

¹ The arguments for and against the exclusion of witnesses are very fairly stated in 1 Ph. Ev. 42—44. Those in support of admitting the evidence of such witnesses (which

the author strongly favoured) were set forth in former editions of this work.

² 61 & 62 V. c. 36; post, § 1372B.

stage of the proceedings. In some few cases, as we shall hereafter see,¹ husbands and wives were prior to the Act, and still are under its provisions, competent witnesses for the prosecution also.

§§ 1344-6. Jeremy Bentham, in the reign of George IV., urged,² that if the discovery of truth were the ends of the rules of evidence, the incompetency of witnesses ought to be removed. In 1833 effect was so far given to his views that it was in that year cautiously enacted³ that no witness should be incompetent to testify in any action, because the judgment therein might subsequently be evidence for or against himself; that if he were examined the judgment should not be so used; and that his name should always be endorsed on the record as having given evidence.

§ 1347. Ten years later—viz., in 1843—Lord Denman carried an Act⁴ which, after stating in the preamble that “the inquiry

¹ Post, §§ 1370, 1372A, and 1372B.

² See 1 Benth. Ev. 6.

³ 3 & 4 W. 4, c. 42 (“The Law Amendment Act, 1833”), extended to Ireland by 3 & 4 V. c. 105 (“The Debtors (Ireland) Act, 1840”), §§ 51, 52 (Ir.), repealed by 16 & 17 V. c. 113, § 3, and Sched. A., and by 38 & 39 V. c. 66. The above provisions of the principal Act were themselves repealed by 37 & 38 V. c. 35.

⁴ 6 & 7 V. c. 85. Progressive changes in the law of Scotland as to the competency of witnesses were made as follows:—In 1840, 3 & 4 V. c. 59 (“The Evidence (Scotland) Act, 1840”), enacted in § 1, that “it shall, by the law of *Scotland*, be no objection to the admissibility of any witness, that he or she is the father or mother, or son or daughter, or brother or sister, by consanguinity or affinity, or uncle or aunt, or nephew or niece, by consanguinity, of any party adducing such witness in any action, cause, prosecution, or other judicial proceeding, civil or criminal; nor shall it be competent to any witness to decline to be examined and give evidence on the ground of any such relationship.” In 1852, 15 & 16 V. c. 27 (“The Evidence (Scotland) Act, 1852,” as now amended by 16 & 17 V. c. 20), enacted:—§ 1. “No person adduced as a wit-

ness in Scotland before any court, or before any person having by law or by consent of parties authority to take evidence, shall be excluded from giving evidence by reason of having been convicted of or having suffered punishment for crime, or by reason of interest, or by reason of agency, or of partial counsel, or by reason of having appeared without citation, or by reason of having been precognosced subsequently to the date of citation; but every person so adduced, who is not otherwise by law disqualified from giving evidence, shall be admissible as a witness, and shall be admitted to give evidence as aforesaid, notwithstanding any objections offered on the above-mentioned grounds: Provided always, that nothing herein contained shall affect the right of any party in the action or proceeding in which such witness shall be adduced to examine him on any point tending to affect his credibility.” [Here followed a proviso making law agents in the suit incompetent witnesses.] In 1853, 16 & 17 V. c. 20 (“The Evidence (Scotland) Act, 1853”), as amended by 37 & 38 V. c. 64, repealed so much of § 1 of “The Evidence (Scotland) Act, 1852,” as rendered agents incompetent witnesses, and the whole of § 2, and

§ 1347. after truth in courts of justice is often obstructed by incapacities created by the present law, and it is desirable that full information as to the facts in issue, both in criminal and in civil cases, should be laid before the persons who are appointed to decide upon them, and that such persons should exercise their judgment on the credit of the witnesses adduced and on the truth of their testimony; "enacts (as now amended), that "no person offered as a witness shall hereafter be excluded, by reason of *incapacity from crime or interest*, from giving evidence either in person or by deposition, according to the practice of the court, on the trial of any issue joined, or of any matter or question, or on any inquiry arising in any suit, action, or proceeding, civil or criminal, in any court or before any judge, jury, sheriff, coroner, magistrate, officer, or person having, by law or by consent of parties, authority to hear,

further enacted:—§ 3. "It shall be competent to adduce and examine as a witness in any action or proceeding in Scotland any party to such action or proceeding, or the husband and wife of any party, whether he or she shall be individually named in the record or proceeding or not; but nothing herein contained shall render any person, or the husband or wife of any person, who in any criminal proceeding is charged with the commission of any indictable offence, or any offence punishable on summary conviction, competent or compellable to give evidence for or against himself or herself, his wife or her husband, excepting in so far as the same may be at present competent by the law and practice of Scotland; or shall render any person compellable to answer any question tending to criminate himself or herself, or shall in any proceeding render any husband competent or compellable to give against his wife evidence of any matter communicated by her to him during the marriage, or any wife competent or compellable to give against her husband evidence of any matter communicated by him to her during the marriage." § 4. [Is now repealed.] § 5. "The adducing of any party as a witness in any cause or proceeding by the adverse party shall not have the effect of a refer-

ence to the oath of the party so adduced: Provided always, that it shall not be competent to any party, who has called and examined the opposite party as a witness, thereafter to refer the cause or any part of it to his oath, and that in all other respects the right of reference to oath shall remain as at present established by the law and practice of Scotland." (As to when such reference may be had, see *Longworth or Yelverton v. Yelverton*, 1867, L. R. 1 H. L. (Sc.) 218.) § 6. "Nothing herein contained shall alter or affect the authority or practice of the courts in Scotland as to judicial examination." In 1874, a further change took place in the law. § 4 of the last-named Act was repealed by 37 & 38 V. c. 64, § 1, and it was enacted by § 2 that, in future in Scotland, "the parties to any proceeding instituted in consequence of adultery, and the husbands and wives of such parties, shall be competent to give evidence in such proceeding; provided that no witness in any proceeding, whether a party to the suit or not, shall be liable to be asked or bound to answer any question tending to show that he or she has been guilty of adultery, unless such witness shall already have given evidence in the same proceeding in disproof of his or her alleged adultery."

receive, and examine evidence; but that every person so offered may and shall be admitted to give evidence on oath, or solemn affirmation in those cases wherein affirmation is by law receivable, notwithstanding that such person may or shall have an *interest in the matter in question, or in the event of the trial* of any issue, matter, question, or injury,¹ or of the suit, action or proceeding in which he is offered as a witness, and notwithstanding that such person offered as a witness may have been *previously convicted of any crime² or offence.*"³ [A proviso here followed in the original Act, which, as to parties themselves, is repealed by 14 & 15 V. c. 99, § 1, set out *infra*, § 1349; and as to their husbands and wives by 16 & 17 V. c. 83, § 4; see post, §§ 1351-2, and also by 37 & 38 V. c. 96.] "Provided also that this Act shall not repeal any provision" in the Wills Act, 1837.³ "Provided that in Courts of Equity any defendant to any cause pending in any such court, may be examined as a witness on the behalf of the plaintiff or of any co-defendant in any such cause, saving just exceptions; and that any interest which such defendant, so to be examined, may have in the matters or in any of the matters in question in the cause, shall not be deemed a just exception to the testimony of such defendant, but shall only be considered as affecting, or tending to affect, the credit of such defendant as a witness."

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§ 1348. In 1846, the Legislature,—while establishing County Courts,—enacted, that "on the hearing or trial of any action, or on any other proceeding under this Act, the parties thereto,

¹ *Sic* in the printed statute. Qu. "*inquiry.*"

² Lush, J., is reported to have ruled, that, notwithstanding these words, a person under sentence of death is incapable of being a witness: *R. v. Webb*, 1867, 11 Cox, C. C. 133. *See qu.* In *R. v. Fitzgerald*, 1884, unreported, the evidence of a convict was admitted, and *R. v. Webb* not followed (Harrison, J.).

³ Independently of this Act, witnesses are competent, though not compellable, to testify to their own turpitude; as, for instance, to admit that their former oaths were corruptly false: *R. v. Teal*, 1809, 11 East, 309; *Rands v. Thomas*, 1816, 5 M. & Selw. 244; or to prove that

notes, to which they have given credit and currency by their signatures, have been fraudulently concocted by them: *Jordaine v. Lashbrooke*, 1798, 7 T. R. 601; overruling *Walton v. Shelley*, 1786, 1 T. R. 296. In fact, the maxim of the civil law, "*nemo allegans suam turpitudinem est audiendus*," is not recognised in English courts of justice; and the decisions of Jefferies, C.J., and Legge, B., who are both reported to have rejected witnesses, when called to prove that they had perjured themselves on some former occasion, are no longer of any authority. See *Titus Oates' case*, 1685, 10 How. St. Tr. 1185; and *Eliz. Canning's case*, 1754, 19 How. St. Tr. 632.

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their wives and all other persons, may be examined either on behalf of the plaintiff or defendant, upon oath or solemn affirmation.”¹

§ 1849. After five years’ experience of the working in the County Courts of the change by which the parties to an action in it were allowed to give evidence, Lord Brougham induced Parliament to pass the Evidence Act, 1851,² the three first sections of which are as follow :—

“ I. So much of § 1 of the Act of 6 & 7 V. c. 85, as provides that the said Act shall ‘not render competent any party to any suit, action, or proceeding individually named in the record, or any lessor of the plaintiff, or tenant of premises sought to be recovered in ejectment, or the landlord or other person in whose right any defendant in replevin may make cognizance, or any person in whose immediate and individual behalf any action may be brought or defended, either wholly or in part,’ is hereby repealed.”

“ II. On the trial of any issue joined, or of any matter or question, or on any inquiry arising in any suit, action, or other proceeding in any court of justice, or before any person having by law, or by consent of parties, authority to hear, receive, and examine evidence, the parties thereto, and the persons in whose behalf any such suit, action, or other proceeding may be brought or defended, shall, *except* as hereinafter excepted, be competent and compellable to give evidence, either *vivâ voce* or by deposition, according to the practice of the court, on behalf of either or any of the parties to the said suit, action, or other proceeding.”

“ III. But nothing herein contained shall render any person, who in any criminal proceeding is charged with the commission of any indictable offence, or any offence punishable on summary conviction, competent or compellable to give evidence for or against himself or herself, or shall render any person

¹ § 83 of 9 & 10 V. c. 95, now repealed. See, for existing law, “The County Courts Act, 1888” (51 & 52 V. c. 43). See, also, 6 & 7 W. 4, c. 75, § 36, and 14 & 15 V. c. 57 (“The Civil Bill Courts (Ireland) Act, 1851”), § 102, which enabled parties to appeal to the oaths of their opponents in the

Irish Civil Bill Courts.

² 14 & 15 V. c. 99. The author of this work was the draftsman of this Act, and in former editions of this work a characteristic letter of acknowledgment and thanks to him from Lord Brougham was set out at length.

compellable to answer any question tending to criminate himself or herself,¹ or shall in any criminal proceeding render any husband competent or compellable to give evidence for or against his wife, or any wife competent or compellable to give evidence for or against her husband.” §§ 1349—1351-2.

§ 1350. In 1853 the Common Law Commissioners in their second Report² expressed an opinion most favourable to the merits of this measure, observing, that “according to the concurrent testimony of the bench, the profession, and the public, the new law is found to work admirably, and to contribute in an eminent degree to the administration of justice;” and these sentiments have been confirmed by a Parliamentary avowal,³ in which it is declared that “the discovery of truth in courts of justice has been *signally* promoted by the removal of restrictions on the admissibility of witnesses.”⁴

§§ 1351-2. The Act already referred to (*viz.*, the Evidence Act, 1851), however, although it rendered husbands and wives admissible witnesses for or against each other, when both were *jointly parties* as plaintiffs or defendants,⁴ did not further interfere with the common law rule, which—except in the County Courts,⁵ the Barmote Courts of Derbyshire,⁶ and the Court of Bankruptcy⁷—precluded either the husband or the wife from giving testimony in a cause in which *the other* was a party.⁸

¹ So much of this proviso as says that no witness need criminate himself was introduced into the Act by the House of Lords at the pressing instance of Lord Truro. As Lord Campbell pointed out at the time, it is merely calculated to raise doubts where none should exist. By the general law of the land, *every witness* is protected from answering questions, where the answer would tend either to criminate himself or to expose him to any penalty, forfeiture, or ecclesiastical censure; and as the Act simply makes parties witnesses, it is obvious that, without any special enactment, they might have claimed the same protection as all other persons under examination. But how stands the matter now? The Act states that they cannot be forced to criminate themselves. Good; but

can they be compelled to disclose what will render them liable to penalties, forfeitures, or spiritual reprimands? Is the maxim, “*expressum facit cessare tacitum*,” to apply, or can the party give the go-by to the statute, and rest on the common law?

² P. 11.

³ Preamble to 32 & 33 V. c. 68 (“The Evidence Further Amendment Act, 1869”).

⁴ *Stokehill and Wife v. Pettingell*, 1852, 21 L. J. Q. B. 249, n.

⁵ 9 & 10 V. c. 95, § 83, cited *ante*, § 1348.

⁶ 14 & 15 V. c. 94, § 18.

⁷ See the repealed Act (12 & 13 V. c. 106, § 118).

⁸ *Stapleton v. Crofts*, 1852, 21 L. J. Q. B. 246; *Barbat v. Allen*, 1852, 21 L. J. Ex. 156.

§§ 1351-2, The Evidence Amendment Act, 1853,¹ was accordingly passed, 1353. the first four sections of which are as follow:—

“I. On the trial of any issue joined, or of any matter or question, or on any inquiry arising in any suit, action, or other proceeding in any court of justice, or before any person having by law or by consent of parties authority to hear, receive, and examine evidence, the husbands and wives of the parties thereto, and of the persons in whose behalf any such suit, action, or other proceeding may be brought or instituted, or opposed, or defended, shall, except as hereinafter excepted, be competent and compellable to give evidence, either *vivâ voce* or by deposition according to the practice of the Court, on behalf of either or any of the parties to the said suit, action, or other proceeding.”

“II. Nothing herein shall render any husband competent or compellable to give evidence for or against his wife, or any wife competent or compellable to give evidence for or against her husband, in any criminal proceeding.”²

“III. No husband shall be compellable to disclose any communication made to him by his wife during the marriage, and no wife shall be compellable to disclose any communication made to her by her husband during the marriage.”

“IV. So much of” § 1 of 6 & 7 V. c. 85, “as provides that the said Act shall not render competent the husband or wife of any party to any suit, action, or proceeding, individually named in the record, or of any lessor of the plaintiff, or of the tenant of premises sought to be recovered in ejectment, or of the landlord or other person in whose right any defendant in replevin may make cognizance, or of any lessor in whose immediate and individual behalf any action may be brought or defended, either wholly or in part, is hereby repealed.”

§ 1353. Both the Evidence Act, 1851, and the Evidence Amendment Act, 1853, however, still left the parties to actions for breach of promise to marry incompetent to give evidence, and parties to suits for divorce were in the same position.³

¹ 16 & 17 V. c. 83.

² Some words which here originally followed were repealed by 32 & 33 V. c. 68, § 1. See post, § 1355.

³ See, on this subject, the power-

ful observations of Lord Denman (then Mr. Denman), in Queen Caroline's trial:—“We have been told,” said he, “that Bergami might be produced as a witness in our excul-

§ 1354. In the year 1857, when the law of divorce was amended, doubts were caused, by the obscure language of the amending statute,¹ as to how far the old doctrines of the common law in relation to the competency of witnesses were to be recognised in the Divorce Court then established. §§ 1354—1355a.

§ 1355. In 1869, however, Mr. Denman (afterwards Mr. Justice Denman) carried through Parliament the Evidence Further Amendment Act, 1869,² which altered the law in both these respects. As to the first point it enacted³ that “the parties to any action for breach of promise of marriage shall be competent⁴ to give evidence in such action,”—but provides, that no plaintiff in any such action “shall recover” a verdict, unless his or her testimony shall be *corroborated* by some other material evidence in support of such promise.”⁵

§ 1355A. The Act also, as regards the second point (after repealing the 4th section of the Evidence Act, 1851, and so much of the 2nd section of the Evidence Amendment Act, 1853, “as is contained in the words ‘or in any proceeding instituted in consequence of adultery’”), enacts⁶ that:—“The parties to any proceeding instituted in consequence of adultery, and the husbands and wives of such parties, shall be competent⁷ to give evidence in such proceeding: Provided that no witness in any

pation, but we know this to be a fiction of lawyers, which common sense and natural feeling would reject. The very call is one of the unparalleled circumstances of this extraordinary case. From the beginning of the world no instance is to be found of a man accused of adultery being called as a witness to disprove it. . . . How shameful an inquisition would the contrary practice engender! Great as is the obligation to veracity, the circumstances might raise a doubt in the most conscientious mind whether it ought to prevail. Mere casuists might dispute with plausible arguments on either side, but the natural feelings of mankind would be likely to triumph over their moral doctrines. Supposing the existence of guilt, perjury itself would be thought venial in comparison with the exposure of a confiding woman. It

follows that no such question ought in any case to be administered, nor such temptation given to tamper with the sanctity of oaths.” Quoted in 1 *Ld. Brougham’s Speech*, 248.

¹ See, and compare, 20 & 21 V. c. 85 (“The Matrimonial Causes Act, 1857”), §§ 41, 43, and 46.

² *Viz.*, 32 & 33 V. c. 68.

³ In § 2.

⁴ By *Ld. Brougham’s Act*, they are also “compellable” to give evidence. See ante, § 1349.

⁵ 32 & 33 V. c. 68, § 2. See *Hickey v. Campion*, 1872, *Ir. R.* 6 C. L. 557; *Bessela v. Stern*, 1877, 2 C. P. D. 265 (C. A.), which latter case shows that no sufficient corroboration is, for example, afforded by the defendant’s merely omitting to answer letters: *Wiedemann v. Walpole*, [1891] 2 Q. B. 534 (C. A.).

⁶ In § 3.

⁷ § 3. By *Ld. Brougham’s Acts*

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proceeding, whether a party to the suit or not, shall be liable to be asked or bound to answer any question tending to show that he or she has been guilty of adultery, unless such witness shall have already given evidence in the same proceeding in disproof of his or her alleged adultery.”¹ The language used in this proviso, though not free from ambiguity, will not protect a party, who tenders himself as a witness for the purpose of disproving one act of adultery, from being cross-examined respecting other acts, provided that these last be duly charged in the pleadings.² Neither does the statute render inadmissible the evidence of a witness that he or she has committed adultery, but it simply protects the witness from being questioned on the subject in the event of the protection being claimed.³ No one but the witness has any right to interfere.⁴

§ 1356. Notwithstanding these changes in the law relating to evidence in civil suits the old common law rule of Incompetency still prevailed in criminal cases, and, until the passing of the Criminal Evidence Act 1898,⁵ rendered two classes of persons altogether incompetent to testify. These persons were, first, persons charged in any criminal proceeding with the commission of any indictable offence, or any offence punishable on summary conviction, and, secondly, the husbands and wives of defendants in any criminal proceeding. To this rule a few exceptions have been engrafted which will be referred to hereafter.⁶

§ 1357. With regard to the first of these classes of persons, namely defendants to indictments and persons charged before magistrates with minor offences, the Evidence Act, 1851,⁷ in making parties to the record admissible witnesses, expressly provided⁸ that nothing in the Act “shall render any person, who in any criminal proceeding is charged with the commission of any

they are also “compellable” to give evidence. See ante, §§ 1349, 1352.

¹ See ante, § 1347, n., ad fin. as to the Scotch Law. A petition to vary a settlement under § 5 of “The Matrimonial Causes Act, 1859” (22 & 23 V. c. 61), is not a proceeding instituted in consequence of adultery within the meaning of § 3 of “The Evidence Further Amendment Act, 1869”: *Evans v. Evans*, [1904] P. p. 378.

² *Brown v. Brown and Paget*, 1874,

L. R. 3 P. & D. 198.

³ *Hebblethwaite v. Hebblethwaite*, 1869, L. R. 2 P. & D. 29; and see, also, *Babbage v. Babbage*, 1870, L. R. 2 P. & D. 222.

⁴ *Hebblethwaite v. Hebblethwaite*, 1869, L. R. 2 P. & D. 29.

⁵ 61 & 62 V. c. 36.

⁶ §§ 1370 and 1372A.

⁷ Viz., “The Evidence Act, 1851” (14 & 15 V. c. 99).

⁸ By § 3, set out ante, § 1349.

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indictable offence, or any offence punishable on summary conviction, competent or compellable to give evidence for or against himself or herself." A difficulty arose in the construction of this proviso, in that it did not say that the persons specified in it should not be rendered competent or compellable to give evidence *at all*, but merely that they should not be allowed or forced to testify *for or against themselves*. Consequently, where several persons were jointly indicted, it was for some years considered by many judges,¹ though some doubted,² that any one of them might (under § 2) be called as a witness either for or against his co-defendants, excepting only in those few cases where the indictment was so framed as to give such person a direct interest in obtaining the discharge of his co-defendants. At last, in 1872, the Court of Crown Cases Reserved, after much discussion, decided that the Evidence Act, 1851, did not alter the ancient law of England, which prohibited any attempt to examine or cross-examine any prisoner on his trial.³ The indirect effect of that decision was to establish that whenever it is desired to obtain the testimony of a defendant in a criminal trial as against his co-defendants, an end must be put to the proceedings against him, either by his pleading guilty on arraignment,⁴ or by the prosecution entering a *nolle prosequi*,⁵ or by an application for a verdict of acquittal being made before the case is opened;⁶ though the court, in its discretion, will in ordinary course direct an acquittal either during the progress or at the termination of the inquiry, if no evidence has been given inculcating the party who is sought to be made a witness.⁷ Nothing short of a formal judgment or a plea of guilty can, however, be considered, as, for this purpose, an end of the matter.⁸ For instance, in general, separate trials being ordered will not

¹ See *R. v. Deeley*, 1870, 11 Cox, C. C. 607; *R. v. Stevenson and Coulter (Ir.)* (Ball, J.), on 4th March, 1851. The indictment in this last case was for an aggravated assault, and Coulter was examined as a witness for Stevenson: MS. See, also, *Winsor v. R.*, 1866, L. R. 1 Q. B. 390.

² See *R. v. Jackson*, 1855, 6 Cox, C. C. 525.

³ *R. v. Payne*, 1872 (per 16 judges).

⁴ *R. v. Gallagher*, 1875, 13 Cox, C. C. 61.

⁵ *R. v. Sherman*, 1736, Cases temp. Hardw. 303; *R. v. Ellis*, 1802, 1 M'Nally, Ev. 55 (Ir.).

⁶ *R. v. Rowland*, 1826, Ry. & M. 401.

⁷ *R. v. Fraser*, 1797, 1 M'Nally, Ev. 56 (Ir.); *R. v. O'Donnell*, 1857, 7 Cox, C. C. 337.

⁸ Gr. on Ev. 15th edit. (1892), § 362.

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suffice.¹ As soon, however, as an end has been legally and effectually put to the case against him, a prisoner always becomes, at common law, and apart from statute, competent to testify, either for the Crown, or for his former co-defendants.² Moreover, under very special circumstances (for instance, where the indictments might have been severed and a joint trial might improperly prejudice the case of one of the defendants), some or one of several persons indicted jointly for publishing blasphemous libels may be put separately on his (or their) trial and allowed to call the other defendants as witnesses, though they still remain liable to be tried for the same offence.³

§ 1358. It will be noticed that the proviso in the Act of 1851 with which we are dealing merely applies to persons who are charged in any *criminal* proceeding, either with *indictable* offences, or with offences punishable by *summary conviction*.⁴ Penal proceedings in the Ecclesiastical Courts do not fall within either of these two categories; and, consequently, on a prosecution there of a clergyman for immoral conduct, the defendant was competent to testify in his own behalf, and could even be subjected to examination on the part of the prosecution.⁵ He cannot, indeed, be compelled to answer any questions tending to expose him to conviction (though this is a point on which, as before observed,⁶ some doubt may possibly be entertained), but should he rely on his legal protection and decline to answer, the inference against him raised by such conduct will be strong.⁷ *Qui tam* actions for penalties,—although to a certain extent they partake of a penal character,—are, too, not included in the language of the proviso; and the defendants in such actions may

¹ *People v. Bill*, 1813, 10 Johns. 95 (Am.).

² *R. v. O'Donnell*, 1857, 7 Cox, C. C. 337, 341.

³ *R. v. Bradlaugh*, 1883, 15 Cox, C. C. 217.

⁴ These words apply to an information against a party under 1 & 2 W. 4, c. 32 ("The Game Act, 1831"), § 23, for using snares to take game, not having a game certificate: *Cattell v. Ireson*, 1858, E. B. & E. 91;—to a summons before petty sessions, to enforce a penalty for keeping a dog without a licence, contrary to "The

Dogs Regulation (Ireland) Act, 1865": *R. v. Sullivan*, 1874, Ir. R. 8 C. L. 404;—also to a summons to find sureties for good behaviour: *R. v. Queen's Cy. JJ., Re Feehan*, 1882, 10 L. R. Ir. 294.

⁵ *Bp. of Norwich v. Pearse*, 1868, L. R. 2 A. & E. 281 (Sir R. Phillimore); overruling *Burder v. O'Neill*, 1863, 9 Jur. (n.s.) 119 (Dr. Lushington). See, also, *Berney v. Bp. of Norwich*, 1867, 36 L. J. Ecc. 10 (P. C.).

⁶ See ante, § 1349, n. 1.

⁷ *Att.-Gen. v. Radloff*, 1854, 23 L. J. Ex. 240.

be examined on either side. The rule is the same as to many charges preferred before justices, which (although in one sense they may be regarded as criminal proceedings) do not result in summary convictions, such as applications for orders of affiliation.¹

§§ 1358—
1361.

§ 1359. Serious doubts were entertained whether an information filed by the Attorney-General for the recovery of penalties consequent on a breach of the revenue laws, was, or was not, such a "criminal proceeding" as to render the defendant an inadmissible witness.² The Legislature interposed *five* times to clear the matter up. On the fourth occasion it was enacted³ affirmatively, that the Evidence Acts of 1851 and 1853⁴ shall extend to proceedings at law on the Revenue Side of the Queen's Bench Division, and negatively, that such proceedings "shall not be deemed criminal proceedings" within the meaning of the said Acts, and the fifth statute⁵ (which is now in force) expressly declares, that where any proceedings are had under the Customs Acts in the Queen's Bench Division on the Revenue Side, "the defendant shall be competent and compellable to give evidence."

§ 1360. Another observation upon the proviso in the Evidence Act, 1851, which we have been discussing, is, that such proviso did not render the persons specified incompetent to testify either for or against themselves,—for the Act in question was in no respect a *disqualifying* statute,—but simply left the previous law on the subject untouched. In whatever cases, therefore, previous to the passing of the Act, defendants charged with offences were rendered competent to give evidence, they might still, notwithstanding the proviso, be examined as witnesses. The principal statutes which authorised such an examination will be found to relate to cases in which the defendant was either a nominal party on the record, or was only one of many persons against whom the proceeding was really instituted.⁶

§ 1361. With regard to the second class of persons who until

¹ *R. v. Berry*, 1859, Bell, O. C. c. 83.
46; *R. v. Lightfoot*, 1856, 25 L. J. M. C. 115.

² *Att.-Gen. v. Radloff*, 1854, 23 L. J. Ex. 240.

³ 28 & 29 V. c. 104, § 34.

⁴ 14 & 15 V. c. 99; 16 & 17 V.

⁵ 39 & 40 V. c. 36, § 259.

⁶ For example by 1 Anne, c. 18, § 13, inhabitants of a county are admissible witnesses on indictments for non-repair of bridges and highways adjoining thereto.

**§§ 1361,
1362.**

recently remained generally absolutely incompetent to testify in criminal proceedings, namely the husbands and wives of defendants, the common law principle was not interfered with either by the Evidence Act, 1851, or by the Evidence Amendment Act, 1853. Both these statutes contained an express proviso, that nothing therein should "render any husband competent or compellable to give evidence for or against his wife, or any wife competent or compellable to give evidence for or against her husband, in any criminal proceeding."¹ The object of the proviso in the first-named Act has been much canvassed by the judges.² But a reference to the history of the Act in question will suffice to show the original propriety of the proviso, which merely left the law of husband and wife precisely where it found it,—excepting only in those few cases where, in civil proceedings, both of them were either parties to the record, or persons in whose behalf the action was brought or defended. In such a state of things, the wife, as a party or an interested person, might, under the express terms of the second section of the same Act, give evidence for or against her husband, and the husband, in like manner, might give evidence for or against his wife. But as a man and his wife were sometimes both *parties* to the same *indictment* or other *criminal* proceeding, the proviso prohibiting them, under such circumstances, from testifying for or against each other was inserted in the Act, to, on this one point, *retain* the old law. The effect of the proviso was to prevent a wife, conjointly indicted with her husband for murder, being called by the prosecutor to establish the man's guilt, or the man being examined by the counsel for the defence to prove the woman's innocence.

§ 1362. The common law rule was framed, however, in such a shape as not only to exclude the husband or wife of a defendant in a criminal proceeding from giving evidence of what occurred during their marriage, but also to prevent such witness from being examined, either as to circumstances that happened *before* the marriage, or even as to the very *fact* of the *marriage* itself.

¹ 14 & 15 V. c. 99 ("The Evidence Act, 1851"), § 3; 16 & 17 V. c. 83, § 2.

² See *Barbat v. Allen*, 1852, 21

L. J. Ex. 156; *Stapleton v. Crofts*, 1852, 21 L. J. Q. B. 246; *Kernot v. Pittis*, 1853, 23 L. J. Q. B. 33.

§§ 1362—
1364.

Thus, on a prosecution for bigamy, the first husband or wife is by it rendered incompetent to be called to prove a marriage with the defendant.¹ The rule was also applicable to all cases in which the interests of a married person, who was a defendant in a criminal proceeding, were involved, and therefore rendered a wife incapable of being a witness for a *co-defendant* with her husband, as her testimony might tend, at least indirectly, to her husband's acquittal.² Accordingly, where the wife of one prisoner was called to prove an alibi in favour of another jointly indicted with her husband for burglary, her testimony was rejected on the ground, that, by shaking the evidence of a witness for the prosecution who had identified both prisoners, it would materially weaken the case against the husband.³

§ 1363. Moreover, no distinction was recognised by the rule between admitting the evidence of married persons for or against each other.⁴ By reason of it, a husband was and still is an inadmissible witness in support of a prosecution, charging his wife and several other persons with conspiring to procure his marriage without the consent of his parents;⁵ and where four men were indicted for sheep-stealing, the testimony of the wife of one to prove facts against the others was rejected.⁶

§ 1364. But though the common law rule of exclusion was thus stringent where a married person was criminally accused in conjunction with others, where such defendant was no longer in peril either because he had pleaded guilty,⁷ or had been convicted or acquitted, it permitted his or her wife or husband to testify either for or against any other persons who might be parties to

¹ Grigg's case, 1672, T. Ray. 1. But the rule often permits the wife, though inadmissible as a witness, to be *produced* in court for the purpose of being *identified*, although the proof thus given may fix a criminal charge upon the husband; for instance, in bigamy, the rule permits it to be common practice to produce the first wife in court, and to have her identified by the witnesses. So, too, she may, consistently with such rule, be pointed out as the person who passed a note which the husband is charged with stealing. See Alison's Pr. p. 463.

² R. v. Thompson and others, 1872, L. R. 1 C. C. E. 377.

³ R. v. Smith, 1826, 1 Moody, C. C. 289. See, also, R. v. Hood, 1830, 1 Moody, C. C. 281; R. v. Frederick, 1738, 2 Str. 1095; R. v. Glassie, 1854, 7 Cox, C. C. 1.

⁴ R. v. Perry, undated (Gibbs, C.J.), cited and approved (Abbott, C.J.) in R. v. Serjeant, 1826, Ry. & M. 352.

⁵ R. v. Serjeant, 1826, Ry. & M. 352.

⁶ R. v. Webb, 1830, 2 Russ. C. & M. 982 (3rd ed.).

⁷ R. v. Thompson and Simpson, 1863, 3 F. & F. 824.

§§ 1364,
1365.

the record.¹ The mere hope that, by giving evidence, a pardon may be procured for a defendant who has been previously convicted of the same or another offence, by no means affects the competency, though it may, and indeed must, shake the credit of the witness.² The wife of a prosecutor in a criminal proceeding is, of course, not excluded by the common law rule from giving evidence either for the Crown or for the defendant.³

§ 1365.⁴ The common law rule of exclusion extended only to *lawful marriages*. Thus, upon a trial for bigamy, the first marriage being proved and not controverted, the woman, with whom the second marriage was had, was always a competent witness either for or against the prisoner; for the second marriage is void.⁵ But if the proof of the first marriage were doubtful, and the fact were controverted, it is conceived that she would not be admissible under the common law.⁶ On principle, too, and it has been expressly so held in America,⁷ cohabitation and acknowledgment, as husband and wife, are conclusive against the parties in all cases except where the facts or the incident of the marriage, such as legitimacy and inheritance, are directly in controversy. But in England, the decisions as to whether, under the common law rule, a man could call as a witness a woman with whom he has long cohabited, whom he has constantly *represented to be his wife*, and by whom he has had children, render the point at least doubtful.⁸ Lord Kenyon rejected such a witness, when tendered for the defence in a capital case;⁹ but in that case the criminal had, *throughout the trial*, admitted that the witness was his wife, and was thus in a manner estopped from denying the marriage when her competency was questioned. When Lord Kenyon's decision was

¹ *Hawkesworth v. Showler*, 1843, 13 L. J. Ex. 86; *R. v. Williams*, 1838, 8 C. & P. 284 (Alderson, B., who stated that, in Thurtell's case, undated, Mrs. Probert was examined as the principal witness against Thurtell, after her husband was acquitted).

² *R. v. Rudd*, 1775, 1 Leach, 127.

³ See *R. v. Houlton*, 1823, 1 Jebb, C. C. 24.

⁴ Gr. Ev. § 339, in part.

⁵ B. N. P. 287; *R. v. Serjeant*, 1826, Ry. & M. 352.

⁶ *Grigg's case*, 1672, T. Raym. 1.

⁷ Gr. on Ev. 15th edit. (1892), note to § 339; *Divoll v. Leadbitter*, 1826, 4 Pick. 220 (Am.).

⁸ *Campbell v. Twemlow*, 1814, 1 Price, 88.

⁹ *Anon.*, 1782, cited (*Richards, B.*) in *Campbell v. Twemlow*, 1814, 1 Price, 88.

subsequently discussed,¹ Park and Burrough, JJ., declared that it was founded on this admission, and the whole court determined that a kept mistress was a competent witness for her protector, though she passed by his name and appeared to the world as his wife. So, where the parties had lived together as man and wife, believing themselves lawfully married, but had separated on discovering that a prior husband, supposed to be dead, was still living, the woman was held to be a competent witness against the second husband, even as to facts communicated to her by him during their cohabitation.² From this last case, and from several others,³ it appears that the common law rule permits a supposed husband or wife to be examined on the *voire dire* to facts showing the invalidity of the marriage; and it is apprehended that such rule affords no valid reason for not admitting their evidence thus far, though the fact that the marriage ceremony has been actually performed may have been previously proved by independent testimony.⁴

§ 1366.⁵ Whether such common law rule of Incompetency may be relaxed so as to admit the wife to testify for or against the husband, where the parties *consent* to such a course, is a question on which the authorities are not agreed.⁶ Lord Hardwicke was of opinion that she was not admissible to give evidence against her husband even with his consent;⁷ and this opinion has been followed in America,⁸ apparently upon the ground that the interest of the husband in preserving the confidence reposed in her is not the sole foundation of the rule,

¹ *Batthews v. Galindo*, 1828, 4 Bing. 613.

² *Wells v. Fletcher*, 1831, 5 C. & P. 12.

³ *R. v. Peat*, 1838, 2 Lewin, C. C. 288; *R. v. Wakefield*, 1827, 2 Lewin, C. C. 279.

⁴ *R. v. Bramley*, 1795, 6 T. R. 330; *R. v. Bathwick*, 1831, 2 B. & Ad. 648, where *Ld. Tenterden* observed, that, "it might well be doubted, whether the competency of a witness can depend upon the marshalling of the evidence, or the particular stage of the cause at which the witness may be called."

⁵ *Gr. Ev.* § 340, in great part.

⁶ Under § 1710, cl. 1, of the New York Civ. Code, "A husband cannot

be examined for or against his wife without her consent, nor a wife for or against her husband without his consent, nor can either, during the marriage or afterwards, be, without the consent of the other, examined, as to any communication made by one to the other during the marriage. But this exception does not apply to a civil action or proceeding by one against the other, nor to a criminal action or proceeding, for a crime committed by one against the other."

⁷ *Barker v. Dixie*, 1736, *Cases temp. Hardw.* 264.

⁸ *Randall's case*, 1820, 5 City Hall Rec. 141 (Am.); *Colbern's case*, 1823, 1 Wheel. C. C. 479 (Am.).

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1367.

but that the public have also an interest in the preservation of domestic peace, which might be disturbed by her testimony, notwithstanding his consent. This is, it is submitted, the correct view.¹ And, in any event, it has been decided² that it is at least discretionary with the judge, whether he will allow an objection to the competency of a witness to be withdrawn by anyone—even the adverse party—and that if he refuses to do so, the court will not interfere.

§ 1367.³ In the instances before mentioned, the common law rule of Incompetency rendered husband and wife inadmissible as witnesses for or against each other. But it, in all other cases, allowed husband or wife to give evidence, notwithstanding that the evidence of the one might *tend* (even strongly) to subject the other to a *criminal charge*.⁴ Thus, on a question respecting a female pauper's settlement, where a man testified that he was married to the pauper, another woman was admitted to prove her own previous marriage with the same man; for although, if the testimony of both witnesses was true, the husband was chargeable with the crime of bigamy, neither the evidence nor the record in that case would be receivable against him upon such a charge, the point at issue being *res inter alios acta*, and neither the husband nor the wife having any interest in the decision;⁵ and in an action on a bill of exchange by indorsee against acceptor, the wife of the drawer would probably be permitted to prove that her husband had forged the bill.⁶ Two learned judges are, however, reported to have held,⁷ that, on an indictment for

¹ But see *contrà*, *Pedley v. Wellesley*, 1829, 3 C. & P. 558, where, on the husband's consenting, Best, C.J., admitted the evidence, citing a decision which he is reported to have said was one of *Lord Mansfield's*. This is probably a mistake, and the case referred to, *Norden v. Williamson*, 1808, 1 Taunt. 377 (decided by Sir James Mansfield), in which the interest of the husband was apparently supposed to be the sole ground of the wife's exclusion, was (it will be observed) before the passing of 16 & 17 V. c. 83, as to which, see *ante*, § 1352.

² *Barbat v. Allen*, 1852, 21 L. J.

Ex. 156.

³ Gr. Ev. § 342, in part.

⁴ See *R. v. Halliday*, 1860, 29 L. J. M. C. 148.

⁵ *R. v. Bathwick*, 1831, 2 B. & Ad. 648; *R. v. All Saints, Worcester*, 1817, 6 M. & Selw. 194. These cases overrule *R. v. Cliviger*, 1788, 2 T. R. 263, where it was broadly held, that a wife was in every case incompetent to give evidence, *tending* to criminate her husband.

⁶ *Henman v. Dickinson*, 1828, 5 Bing. 183. In this case the point was not expressly decided.

⁷ *R. v. Gleed*, 1832, 3 Russ. C. & M. 623.

theft, a woman could not be called on the part of the Crown, to, §§ **1367—1370.**
 in effect, directly prove that her husband was a thief—by showing that he was present when the property was taken, and that she saw him deliver it to the prisoner.

§ 1368. But although, by the common law rule of Incompetency, the wife may be *permitted* to give evidence which may indirectly criminate her husband, it by no means follows that she can be *compelled* to do so; and the better opinion is that under it she may throw herself upon the protection of the court, and decline to answer any question which would tend to expose her husband to a criminal charge.¹

§ 1369. In actions, suits, and other proceedings between third parties, husbands and wives have always been permitted to *contradict*, and even to *discredit*, each other as freely as if the marriage were void.² Otherwise the competency of the witness would depend upon the marshalling of the evidence, and the testimony of a husband might be rendered inadmissible for the defendant, from the accidental circumstance that the plaintiff had previously called the wife, though had the defendant been entitled to begin, the husband would have been examined, and the wife's evidence subsequently rejected. In Ireland, even where the husband is the prosecutor of an indictment, the evidence of a wife cannot be rejected on the ground that she is brought to contradict her husband.³

§ 1370.⁴ To the common law rule that defendants and their husbands and wives were incompetent to testify in criminal proceedings certain exceptions came to be engrafted, thus, when a personal injury had been committed by the one against the other, an exception of necessity arose to the general common law rule rendering husbands and wives incompetent to give testimony for or against each other—since, but for this exception, the wife would have been left by the common law exposed without remedy

¹ *R. v. All Saints, Worcester*, 1817, 6 M. & Selw. 194 (Bayley, J.); *Cartwright v. Green*, 1803, 2 Leach, C. C. 952; post, § 1453.

² *Stapleton v. Crofts*, 1852, 21 L. J. Q. B. 246 (Ld. Campbell); *id.*, as reported 18 Q. B. 373 (Erle, J.); *R. v. Bathwick*, 1831, 2 B. & Ad. 648;

R. v. All Saints, Worcester, 1817, 6 M. & Selw. 194 (Ld. Ellenborough); *Annesley v. Ld. Anglesea*, 1743, 17 How. St. Tr. 1276 (H. L.).

³ *R. v. Houlton*, 1823, 1 Jebb, C. C. 24.

⁴ Gr. Ev. § 343, in part.

§ 1370. to the most brutal treatment from her husband.¹ On the indictment, too, of a man for the forcible abduction of a woman with intent to marry her,² she is (after the marriage) clearly a competent witness against him, if the force were continuing against her till that event. She is also a competent witness to prove the marriage itself; and the better opinion seems to be, that she is still competent, notwithstanding her subsequent assent to it, and her voluntary cohabitation; for, otherwise, the offender would take advantage of his own wrong.³ Similarly, on an indictment for the *fraudulent* abduction of an heiress, the lady may be a witness.⁴ A wife may testify against her husband on an indictment for assisting at a rape committed on her person;⁵ or, for an assault and battery upon her;⁶ or, for maliciously shooting,⁷ or attempting to poison,⁸ her; or, it seems, for any other offence against her liberty or person.⁹ She may also exhibit articles of the peace against him, in which case her affidavit will not be allowed to be controlled and overthrown by his own.¹⁰ Indeed, East considers that "in all cases of personal injuries committed by the husband or wife against each other, the injured party is an admissible witness against the other."¹¹

¹ See *Bentley v. Cooke*, 1784, 3 Doug. 424.

² Under 24 & 25 V. c. 100 ("The Offences against the Person Act, 1861"), § 54; and see now 61 & 62 V. c. 36 ("The Criminal Evidence Act, 1898"), post, § 1372B.

³ *R. v. Wakefield*, 1827, 2 Lewin, C. C. 279, trial published by Murray; *Brown's case*, 1673, 1 Ventr. 243; *Perry's case*, cited in *R. v. Serjeant*, 1826; 1 Hawk. c. 41, § 13; 1 Bl. Com. 443; *McNally*, Ev. 179, 180; 3 Chit. Cr. L. 817, n. (y).

⁴ *R. v. Yore*, 1839, 1 Jebb & Sy. 563. This case was decided on the Irish Act, now repealed, of 10 G. 4, c. 34, § 23. The law is re-enacted in 24 & 25 V. c. 100 ("The Offences against the Person Act, 1861"), § 53.

⁵ *Ld. Audley's case*, 1631, 3 How. St. Tr. 402, 413; *R. v. Jellyman*, 1838, 8 C. & P. 604.

⁶ *B. N. P.* 287; *R. v. Azire*, 1737-8, 1 Str. 633; *Soule's case*, 1828, 5 Greenl. 407 (Am.).

⁷ *R. v. Whitehouse*, undated, cited 3 Russ. C. & M. 625.

⁸ *R. v. Jagger*, 1797, cited 3 Russ. C. & M. 625.

⁹ *Hullock, B.*, in *R. v. Wakefield*, 1827, trial published by Murray, 257.

¹⁰ *R. v. Doherty*, 1810, 13 East, 171; *Ld. Vane's case*, 1743-4, 13 East, 171, n. (a); *R. v. Ld. Ferrers*, 1758, 1 Burr. 635. Her affidavit is also admissible, on an application for an information against him for an attempt to take her by force, contrary to articles of separation: *Lady Lawley's case*, undated; or, on a return to a habeas corpus sued out by him: *R. v. Mead*, 1758, 1 Burr. 542. In America she is even allowed to prosecute her husband for perjury contained in an affidavit made and used by him against her in the course of divorce proceedings: *Dill v. People*, 1894, 41 Am. St. R. 254.

¹¹ 1 East, P. C. 455; *The People, ex. rel. Ordronaux v. Chegaray*, 1836, 18 Wend. 642 (Am.).

But though competent as a witness, it is not indispensable that such party should be called;¹ and Holroyd, J., seems even to have thought² that the husband or wife could only be admitted to prove facts, which could not be proved by any other witness, though it may be questioned whether this be not restricting the rule too narrowly. After much doubt upon the subject had been expressed by the courts as to whether a wife be or be not an admissible witness against her husband, in proceedings against him under the Vagrancy Act, 1824,³ for *deserting* her, and causing her to become chargeable to the parish,⁴ it was decided that she is not.⁵ The law has, however, been remedied on this point, and the wife may by statute now be called as a witness in a prosecution under this Act for desertion, without the consent of the person charged.⁶

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1371.

§ 1371. The exception to the general rule that a wife may not give evidence against her husband, which has been partially discussed in the last paragraph, was formerly held only to exist upon the hearing of charges brought by the wife against her husband of inflicting *personal* injuries upon her, and consequently, a husband was not permitted to give evidence against his wife or her paramour, where the two offenders were indicted conjointly for stealing his property at the time of their elopement.⁷ But this extremely unsatisfactory condition of the law has now for some years been remedied, and by the joint operation of the statutes in force as to the property of married women,⁸ it has been for some years provided, that, in any criminal proceeding, whether the same be brought by a wife against her husband, "for the protection and security of her own separate property," or be one brought by a husband against his wife with respect to his property, the spouses respectively "shall be competent and

¹ *R. v. Pearce*, 1840, 9 C. & P. M. C. 15.
668.

² In *R. v. Whitehouse*, undated, cited 3 Russ. C. & M. 625.

³ 5 G. 4, c. 83, § 4; amended by 34 & 35 V. c. 112, § 15; by 47 & 48 V. c. 43; and by 34 & 55 V. c. 70, § 7.

⁴ *Sweeney v. Spooner*, 1863, 32 L. J. M. C. 82.

⁵ *Reeve v. Wood*, 1865, 34 L. J.

⁶ See "The Criminal Evidence Act, 1898" (61 & 62 V. c. 36), § 4 (1), and Schedule.

⁷ *R. v. Brittleton and Bates*, 1884, 12 Q. B. D. 266.

⁸ 45 & 46 V. c. 75 ("The Married Women's Property Act, 1882"), §§ 12, 16; amended by "The Married Women's Property Act, 1884" (or 47 & 48 V. c. 14, § 1).

§§ 1371—admissible witnesses, and, except when defendant, compellable to
 1372a. give evidence.”¹

§ 1372.² In cases of *high treason*, the question, whether the wife is admissible as a witness against her husband, has been much discussed, and opinions of great weight have been given on both sides.³

§ 1372A. In recent years the Legislature, recognising the inconvenience and injustice of the common law rule as to the incompetency of witnesses in criminal cases, has, in many statutes dealing with specific offences, enacted that persons charged with the offence and their husbands and wives might be permitted to give evidence for the defence; thus, the Criminal Law Amendment Act, 1885,⁴ which created several new offences against women and children, provided that when a person was charged with any offence, either under that Act, or with certain offences under specified sections of 24 & 25 V. c. 100, the person charged, and the husband or wife of such person, should be competent but not compellable to give evidence. Evidence given by a prisoner pursuant to this provision may be used to convict him of another charge.⁵ So also, the Law of Libel Amendment Act, 1888,⁶ rendered persons charged with the offence of libel before any Court of Criminal Jurisdiction, and their husbands and wives, competent but not compellable witnesses. “The Evidence Act, 1877,”⁷ enacted that on the trial of an indictment or other proceeding for the non-repair of any public highway or bridge, or for a nuisance to any public highway, river or bridge, and of any other indictment or proceeding instituted for the purpose of

¹ 47 & 48 V. c. 14, § 1.

² Gr. Ev. § 345, in great part.

³ The affirmative of the question is maintained (B. N. P. 286; 1 Gilb. Ev. 252; Grigg’s case, 1672, T. Rayn. 1) on the ground of the extreme necessity of the case, and the nature of the offence, tending, as it does, to the destruction of many lives, the subversion of government, and the sacrifice of social happiness. But, on the other hand, it is argued, that these political reasons are not sufficient to support an exception to a rule of general utility, and that, as the wife is not bound to discover her

husband’s treason (1 Brownl. 47), by parity of reason, she is not compellable to testify against him (see 1 Hale, 301; 2 Hawk. c. 46, § 82; Bac. Abr. tit. Ev. A. 1; 1 Chit. Cr. L. 595; M’Nally, Ev. 181). The latter is, perhaps, the better opinion.

⁴ 48 & 49 V. c. 69, § 4.

⁵ R. v. Owen, 1888, 20 Q. B. D. 829.

⁶ 51 & 52 V. c. 64, § 9.

⁷ 40 & 41 V. c. 14. This provision is still in force, and is not affected by the Criminal Evidence Act, 1898, see post, § 1372E.

trying and enforcing a civil right only, every defendant to such indictment or proceeding, and the wife or husband of any such defendant shall be admissible witnesses and *compellable* to give evidence. Altogether from the year 1872, to the end of the year 1897, some twenty-seven Acts were passed, varying slightly in their terms, rendering such persons competent witnesses.¹

¹ In addition to the instances mentioned in the text such a right was given in the following cases: under "*The Mines Regulation Act, 1872*" (35 & 36 V. c. 76, § 63, sub-sect. 4, and c. 77, § 34, sub-sect. 4), on a charge under the Acts against the owner, agent, or manager of any mine, such person "may if he think fit be sworn and examined as an ordinary witness in the case where he is charged in respect of any contravention or non-compliance by another person." "*The Licensing Act, 1872*" (35 & 36 V. c. 94, § 51, sub-sect. 4), provides that "the defendant and his wife shall be competent to give evidence." "*The Explosives Act, 1875*" (38 & 39 V. c. 17, § 87), provides that the occupier of a factory or other defendant "when charged in respect of any offence by another person, may, if he think fit, be sworn and examined as an ordinary witness in the case." "*The Sale of Food and Drugs Act, 1875*" (38 & 39 V. c. 63, § 61), gives a defendant and his wife, on a prosecution under the Act the same rights of giving evidence as the Licensing Act (which see). Under "*The Conspiracy and Protection to Property Act, 1875*" (38 & 39 V. c. 86, § 11), the respective parties to a contract of service, their husbands and wives, are to be deemed competent witnesses. "*The Threshing Machines Accidents Prevention Act, 1878*" (41 & 42 V. c. 12, § 3, sub-sect. 2), enables any person prosecuted under it, "on his own application, to be sworn and examined as a witness." Under "*The Army Act, 1881*" (44 & 45 V. c. 58, § 156, sub-sect. 3), on a charge against a person of illegally purchasing from a soldier any regimental necessaries and equipments or stores, the accused "and the wife or husband of such person may, if he or she thinks fit, be sworn and examined as an

ordinary witness in the case." "*The Married Women's Property Act, 1882*" (45 & 46 V. c. 75, § 12), provides that a wife may, under certain circumstances institute criminal proceedings against her husband, and that in any proceeding under the section "a husband or wife shall be competent to give evidence against each other," and by the "*Married Women's Property Act Amendment Act, 1884*" (47 V. c. 14, § 1), it is provided that "in any such criminal proceeding against a husband or a wife as is authorised by the Married Women's Property Act, 1882, the husband and wife respectively shall be competent and admissible witnesses, and except when defendant, compellable to give evidence." "*The Explosive Substances Act, 1883*" (46 & 47 V. c. 3, § 4 (2)), enacts that in any proceeding under § 4 the accused person and his or her wife or husband may give evidence. Under "*The Corrupt and Illegal Practices Prevention Act, 1883*" (46 & 47 V. c. 51, § 53, sub-sect. 2, continued in force till 31st December, 1895, by 57 & 58 V. c. 48), on a prosecution under the Act "whether on indictment or summarily" the person prosecuted and the husband or wife of such person "may if he or she think fit be examined as an ordinary witness in the case," and under "*The Corrupt and Illegal Practices Prevention Act, 1895*" (58 & 59 V. c. 40, § 2), an accused and his or her wife or husband, are competent to give evidence. "*The Merchandise Marks Act, 1887*" (50 & 51 V. c. 28, § 10 (1)), enacts that in a prosecution under the Act a defendant and his or her wife or husband may give evidence. By "*The Coal Mines Regulation Act, 1887*" (50 & 51 V. c. 58, § 62), "any person charged with any offence under this Act, may if he thinks fit be sworn and

§ 1372a.

§ 1372b. § 1372b. The incompetency of defendants and their husbands and wives to give evidence for the defence in criminal proceedings was finally swept away by "The Criminal Evidence Act, 1898,"¹ which enacts² that "every person charged with an offence, and the wife or husband, as the case may be, of the person so charged, shall be a competent witness for the defence at every stage of the proceedings, whether the person so charged is charged solely or jointly with any other person." The Act further provides that the person charged shall not be called as a witness in pursuance of the Act except upon his own application,³ and that the wife or husband of the person charged shall not be called as a witness except upon the application of the person charged in any other cases than those mentioned in the schedule

examined as an ordinary witness in the case." "*The Public Health (London) Act, 1891*" (54 & 55 V. c. 76, § 118), provides that any person charged with an offence under the Act, "and the wife or husband of such person, may, if such person thinks fit, be called, sworn, examined, and cross-examined as an ordinary witness in the case," and "*The Betting and Loans (Infants) Act, 1892*" (55 V. c. 4, § 6), contains a similar provision. "*The Prevention of Cruelty to Children Act, 1894*" (57 & 58 V. c. 41, § 12), repealed and re-enacted by "*The Prevention of Cruelty to Children Act, 1904*" (4 Ed. 7, c. 15), § 12, provides that in any proceeding for an offence under the Act, or for any offence mentioned in the Schedule to the Act, the person charged "shall be competent but not compellable to give evidence, and the husband or wife of such person may be required to attend to give evidence as an ordinary witness in the case, and shall be competent but not compellable to give evidence." "*The Building Societies Act, 1894*" (57 & 58 V. c. 47, § 24), enacts that "upon the hearing of any charge involving the infliction of fine or imprisonment under the Act the defendant and his wife shall be admissible as competent witnesses." Under "*The Diseases of Animals Act, 1894*" (57 & 58 V. c. 57, § 57 (3)), a person charged

"may, if he thinks fit, tender himself to be examined on his own behalf, and thereupon he may give evidence in the same manner and with the like effect and consequences as any other witness." "*The Merchant Shipping Act, 1894*" (57 & 58 V. c. 60, § 457, sub-sect. 2), provides that the master of a ship charged with a misdemeanor under the section "may give evidence in the same manner as any other witness." "*The Law of Distress Amendment Act, 1895*" (58 & 59 V. c. 24, § 5), contains, as to offences under the Act, a similar provision to that contained in the Prevention of Cruelty to Children Act (supra), as also does "*The False Alarms of Fire Act, 1895*" (58 & 59 V. c. 28, § 2). "*The Factory and Workshop Act, 1895*" (58 & 59 V. c. 37, § 49) (now repealed by 1 Ed. 7, c. 22), contained a similar provision to that in the Diseases of Animals Act (supra); and finally "*The Chaff Cutting Machines (Accidents) Act, 1897*" (60 & 61 V. c. 60, § 5), provides that every person charged with an offence under the Act "and the husband or wife of the person so charged, shall be competent but not compellable witnesses on every hearing at every stage of such charge."

¹ 61 & 62 V. c. 36.

² By § 1.

³ § 1 (a).

to the Act,¹ and those in which the wife or husband of a person charged may at common law be called without the consent of that person.² The Act, however,³ re-affirms the old common law rule that was retained by "The Evidence Amendment Act, 1868,"⁴ when authorising husbands and wives to give evidence in civil suits, namely, that husbands and wives shall not be compellable to disclose any communication made between them during the marriage.⁵ The provision authorising a person charged to give evidence "at every stage of the proceedings," enables a fugitive criminal to give evidence upon the hearing of the extradition proceedings.⁶ It does not however give a person charged any right to give evidence before the grand jury,⁷ nor does it entitle him to give evidence on oath in mitigation of sentence after he has pleaded guilty.⁸ The accused ought to be informed of his right to give evidence, but failure to do so will not render the trial invalid.⁹ Should the accused, in giving evidence under the Act, commit perjury he may be prosecuted therefor in the same manner as any other witness.¹⁰

¹ These are:—Prosecutions under "*The Vagrancy Act, 1824*" (5 Geo. 4, c. 83), for neglecting to maintain or deserting a wife or member of family, prosecutions under § 80 of "*The Poor Law (Scotland) Act, 1845*" (8 & 9 V. c. 83), under §§ 48—55 of "*The Offences against the Person Act, 1861*" (24 & 25 V. c. 100), under §§ 12 and 16 of "*The Married Women's Property Act, 1882*" (45 & 46 V. c. 75), under "*The Criminal Law Amendment Act, 1885*" (48 & 49 V. c. 69), and under "*The Prevention of Cruelty to Children Act, 1894*" (57 & 58 V. c. 41). This last mentioned Act has been repealed by "*The Prevention of Cruelty to Children Act, 1904*" (4 Ed. 7, c. 15), which provides by § 12, "that in any proceeding against any person for an offence under this Act, or for any of the offences mentioned in the First Schedule of the Act such person shall be competent but not compellable to give evidence, and the wife or husband of such person may be required to attend to give evidence as an ordinary witness in the case and shall be competent but not compellable to give evidence." It appears

therefore that a husband or wife, although competent witnesses for the prosecution on a charge of cruelty under the Act or for an offence mentioned in the Schedule without the consent of the prisoner, may nevertheless, if they think fit, refuse to give evidence.

² 61 & 62 V. c. 36, §§ 1 (c), 4, sub-sects. 1 and 2. In Scotland, in a case where a list of witnesses is required, the husband or wife of a person charged shall not be called as a witness for the defence, unless notice be given in the terms prescribed by § 36 of the Criminal Procedure (Scotland) Act, 1887, see § 5.

³ By § 1 (d).

⁴ 16 & 17 V. c. 83, § 3.

⁵ As to the scope of this rule see ante, §§ 909A—910A.

⁶ *R. v. Kams*. Times, 28th April, 1900, referred to in Biron and Chalmers on Extradition, p. 41.

⁷ *R. v. Rhodes*, [1899] 1 Q. B. 77.

⁸ *R. v. Hodgkinson*, 1900, 64 J. P. 808 (Darling, J.).

⁹ *R. v. Saunders*, 1898, 63 J. P. 24.

¹⁰ *R. v. Wookey*, 1899, 63 J. P. 409.

§ 1372c.

§ 1372c. The Act contains various provisions for the protection of the person charged, thus his failure to give evidence must not be made the subject of any comment by the prosecution;¹ nor may he be asked, or required to answer, any question tending to show that he has committed, or been convicted of, or been charged with any offence other than that wherewith he is then charged, or is of bad character, unless—(i.) the proof that he has committed or been convicted of such other offence, is admissible evidence to show that he is guilty of the offence wherewith he is then charged;² or (ii.) he has personally, or by his advocate, asked questions of the witnesses for the prosecution with a view to establish his own good character, or has given evidence of his good character, or the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution; or (iii.) he has given evidence against any other person charged with the same offence.³ He may, however, be asked questions in cross-examination which tend to criminate him as to the offence charged.⁴ The Act further provides that persons giving evidence in pursuance of its provisions shall do so from the witness box or other place from which the other witnesses give their evidence, unless otherwise ordered by the court;⁵ that the accused shall, notwithstanding the Act, be still entitled to make a statement without being sworn as formerly;⁶ and that in cases where the right to reply depends upon the question whether evidence has been called for the defence, the fact that the person charged has been called as a witness shall not of itself confer on the prosecution any right of reply.⁷ Although the failure of a prisoner to give evidence must not be made the subject of any comment by the prosecution, it has been held that the court itself may comment upon the fact to the jury.⁸ It is submitted, however, that such right should be sparingly exercised. When one prisoner gives evidence on oath inculcating another charged on a joint indictment, he is liable to be cross-examined by, or on

¹ § 1 (b).² See *R. v. Rhodes*, [1899] 1 Q. B. 77, also §§ 345—347, *supra*.³ § 1 (i).⁴ § 1 (e).⁵ § 1 (g).⁶ § 1 (h).⁷ § 3.⁸ *R. v. Rhodes*, *supra*; and see *Kops v. R.*, [1894] App. Cas. 650.

behalf of that other.¹ The mere statement by a prisoner under examination, that a fact deposed to by the prosecutor is "a lie, and he is a liar," has been held not to be such an attack upon the character of the prosecutor as to entitle counsel for the prosecution to cross-examine the prisoner as to character and previous convictions.² Moreover, it would appear that questions put to the witnesses for the prosecution for the *bonâ fide* purpose of raising a defence, will not necessarily subject the prisoner to cross-examination as to previous convictions, although the defence so raised may suggest a state of facts not creditable to a witness for the prosecution.³ If counsel for the prisoner, without objection, allows questions to be put in cross-examination as to previous convictions, a conviction obtained cannot afterwards be set aside on the ground of the inadmissibility of such questions.⁴

§§ 1372c,
1372d.

§ 1372d. When the only witness to the facts of the case called for the defence is the person charged, the Act provides⁵ that he shall be called immediately after the close of the evidence for the prosecution; the effect of this provision and that contained in §3,⁶ is that in such a case the counsel for the prosecution sums up the case for the Crown immediately after the accused has given his evidence,⁷ and in so doing he is entitled to comment on the evidence given by the accused.⁸ Where a prisoner has given evidence on oath under the Act before the magistrates by whom he is committed for trial, his deposition may be put in evidence against him at the trial, although he then elects not to give evidence.⁹

¹ *R. v. Hadwen*, [1902] 1 K. B. 882. It seems difficult to lay down any general rule as to what is such an attack on the reputation of the prosecutor or witnesses for the prosecution as will admit such cross-examination. In a case heard in 1899 at the Lancashire Assizes referred to in 34 L. J. N. p. 100, Day, J., held that cross-examination of the witnesses for the prosecution on a charge of rape tending to show consent was such conduct of the defence as to admit such cross-examination. In *R. v. Holmes*, Lancashire Assizes, 1899, the same judge held that evidence of the prisoner that prosecutrix was a "drunken wastrel" rendered such

cross-examination admissible.

² *R. v. Rouse*, [1904] 1 K. B. 184. Evidence, however, by the prisoner that one of the witnesses for the prosecution and not the prisoner committed the offence, has been held to render the prisoner subject to cross-examination as to previous convictions, see *R. v. Marshall*, 1899, 63 J. P. 36 (Darling, J.).

³ *R. v. Bridgwater*, [1905] 1 K. B. 131.

⁴ *R. v. Bridgwater*, [1905] *supra*.

⁵ § 2.

⁶ Ante, § 1372c.

⁷ *R. v. Gardner*, [1899] 1 Q. B. 150.

⁸ *Id.*

⁹ *R. v. Bird*, 1898, 79 L. T. 359; *R. v. Boyle*, 20 T. L. R. 192.

§§ 1372e
—1373.

§ 1372e. The Act applies to all criminal proceedings, notwithstanding any enactment in force at the time of its commencement.¹ It is, however, provided that nothing in the Act shall affect the Evidence Act, 1877.² The effect, therefore, is to establish a uniform practice in all criminal courts and cases, notwithstanding the provisions of the existing Acts authorising prisoners and their husbands and wives to testify; thus, where a prisoner is charged with an offence under the Prevention of Cruelty to Children Act, 1894,³ and elects to give evidence, he cannot be cross-examined as to previous convictions, although he might have been under the provisions of the last-mentioned Act.

§ 1372f. The Act does not apply to Ireland, but its provisions have been made applicable to proceedings in that country for offences against the Motor Car Act, 1902;⁴ nor does the Act apply to proceedings in courts-martial⁵ unless and until it is so applied by orders and rules made in pursuance of the Naval Discipline Act,⁶ and the Army Act.⁷

§ 1372g. The only classes of persons who now remain incompetent to testify, in addition to the husbands and wives of persons charged with criminal offences, who, as we have seen,⁸ are in general only admissible upon the application of the person charged, are, *first*, persons who, in cases of high treason and misprision of treason (other than such as consists in injuring or attempting to injure the person of the Sovereign⁹), are not included, or properly described in the list of witnesses delivered to the defendant pursuant to statute;¹⁰ and, *secondly*, persons devoid of sufficient understanding to know what they are about.

§ 1373. With regard to the *first* of these classes the statute

¹ § 6.

² 40 & 41 V. c. 14. For the provisions of this Act see ante, § 1372A.

³ 57 & 58 V. c. 41. For the provisions of this Act, see ante, § 1372A n.

⁴ 3 Ed. 7, c. 36, § 19 (14).

⁵ 61 & 62 V. c. 36, § 6, subsect. 2.

⁶ 29 & 30 V. c. 109, § 65.

⁷ 44 & 45 V. c. 58, § 70.

⁸ Ante, § 1372b.

⁹ Treasons which consist in compassing the assassination, wounding,

or injuring the person of the Sovereign, or to the misprisions of such treasons are not within the Act; because parties accused of such offences, are, by statute, liable to be dealt with as if charged with murder: by 39 & 40 G. 3, c. 93 ("The Treason Act, 1800"); 1 & 2 G. 4, c. 24, § 2 (Ir.); 5 & 6 V. c. 51 ("The Treason Act, 1842"), § 1; ante, § 958.

¹⁰ 7 A. c. 21 ("The Treason Act, 1708"), extended to Ireland by 17 & 18 V. c. 26, passed in consequence of the decision on O'Brien v. R. 1849, 2 H. L. C. 465.

provides,¹ "when any person is indicted for high treason, or misprision of treason, a list of the witnesses that shall be produced on the trial for proving the said indictment, and of the jury, mentioning the names, profession, and place of abode of the said witnesses and jurors, be also given at the same time that the copy of the indictment is delivered to the party indicted; and that copies of all indictments for the offences aforesaid, with such lists, shall be delivered to the party indicted, ten days before the trial, and in presence of two or more credible witnesses." In strict law, this list should be delivered ten days at least before the arraignment,² and in the presence of two or more credible witnesses, *simultaneously* with the jury list and the copy of the indictment. An objection which goes to the array of witnesses, founded on non-compliance with these regulations, must be taken before the jury are sworn, and its effect will be to postpone the trial;³ but an objection by a defendant that some particular witness is incompetent, as not included in the list, or as misdescribed therein, may, like any other question of competency, be taken upon the *voire dire* when the witness is called, and before he is sworn, and if it prevails the witness cannot be examined.⁴

§§ 1373,
1374.

§ 1374. The object in requiring the name, place of abode, and profession, of each witness to be stated in the list is, to enable the defendant before trial to make due inquiry respecting his character. The list need not specify the particular house or street where the witness resides, but will suffice if it describes him as living in a certain town or parish,⁵ and if a witness has two or more residences, need only specify one; but if it aim at further particularity, and misdescribe any one of the places of abode, this inaccuracy vitiates the whole description.⁶ A witness who has recently changed his place of abode, must be described as of his new residence, and it will not suffice to describe him as *lately* abiding at the former one.⁷

¹ 7 A. c. 21, § 11.

² The word "trial" must bear this interpretation since "The Juries Act, 1825" (6 G. 4, c. 50), § 21: R. v. *Ld. Geo. Gordon*, 1781, 21 How. St. Tr. 648.

³ R. v. *Watson*, 1817, 2 Stark. R. 139; R. v. *Frost*, 1840, 9 C. & P.

183; O'Brien v. R., 1849, 2 H. L. C. 465.

⁴ R. v. *Frost*, 1840, 9 C. & P. 183.

⁵ R. v. *Frost*, 1840, 9 C. & P. 183.

⁶ 9 C. & P. 151—153.

⁷ R. v. *Watson*, 1817, 2 Stark. R. 116, 128.

**§§ 1375,
1376.**

§ 1375. The *second class* of witnesses rejected by the law includes all who are mentally incapable of comprehending the nature of an oath or affirmation, or of giving a moderately rational answer to a sensible question—whether this incapacity be due to mere unripeness of understanding, as in the case of a child, or to a congenital want of intellect, or to some temporary obscuration of the reasoning faculties rendering the person an idiot, a lunatic, or drunk.¹ The incapacity is, however, only co-extensive with the defect. Accordingly, a monomaniac, or a person who is afflicted with partial insanity, will be an admissible witness, if the judge finds him upon investigation aware of the nature of an oath or declaration, and capable of understanding the subject, with respect to which he is required to testify.² A witness will, too, be rendered competent, in the case of total madness, by the occurrence of a lucid interval,³—in the case of intoxication by the return of sobriety.⁴ Judges will, indeed, occasionally postpone trials of importance where, without the witness's testimony, the ends of justice will probably be defeated, if they have good cause to believe that he within a reasonable time will be able to testify.⁵ In all such cases the application for postponement must be made before the jury is sworn, as the court cannot on this ground discharge the jury after the commencement of the trial.⁶

§ 1376.⁷ Persons *deaf and dumb* from birth were formerly in presumption of law idiots.⁸ But this presumption is no longer recognised,⁹ as persons afflicted with these calamities have been

¹ In India, the rule on this subject is as follows:—"All persons shall be competent to testify, unless the court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease whether of body or mind, or any other cause of the same kind. Explanation—A lunatic is not incompetent to testify, unless he is prevented by his lunacy from understanding the questions put to him and giving rational answers to them": § 118 of the Indian Evidence Act, 1872.

² *R. v. Hill*, 1851, 2 Den. 254. See *Spittle v. Walton*, 1851, L. R. 11 Eq. 420.

³ Com. Dig., Testmoigne, A. 1.

⁴ *Hartford v. Palmer*, 1819, 16 Johns. 153 (Am.); Hein. ad Pand. Pars 3, § 14.

⁵ *R. v. White*, 1786, 1 Leach, C. C. 430, n.

⁶ *R. v. Wade*, 1825, 1 Moody, C. C. 86; *R. v. Kinloch*, 1746, 18 How. St. Tr. 402.

⁷ Gr. Ev. § 366, in some part.

⁸ *R. v. Steel*, 1787, 1 Leach. 452.

⁹ *Harrod v. Harrod*, 1854, 1 K. & J. 4 (Wood, V.-C.). If a deaf mute be put on his trial for felony, and the jury find that he cannot understand the proceedings, he will be detained as a non-sane person during the Queen's pleasure; *R. v. Berry*, 1876, 1 Q. B. D. 447.

found, by the light of modern science, to be much more intelligent in general, and to be susceptible of far higher culture, than was once supposed. Still, when a deaf mute is adduced as a witness, the court, in the exercise of due caution, will take care to ascertain before he is examined, that he possesses the requisite amount of intelligence, and that he understands the nature of an oath. When the judge is satisfied on these heads, the witness may be sworn and give evidence by means of an interpreter. If he is able to communicate his ideas perfectly by writing, he will be required to adopt that, as the more satisfactory method;¹ but if his knowledge of that method is imperfect, he will be permitted to testify by means of signs.²

§§ 1376,
1377.

§ 1377. No *precise age* is fixed by law within which *children* are absolutely excluded from giving evidence, on the presumption that they have not sufficient understanding.³ Nor can any precise rule be laid down respecting the degree of *intelligence* and *knowledge* which will render a child a competent witness. In all questions of this kind much must always depend upon the good sense and discretion of the judge.⁴ In practice, it is not unusual to receive

¹ *Morrison v. Lennard*, 1827, 3 C. & P. 127.

² *Id.*; *R. v. Ruston*, 1786, 1 Leach, 408; *R. v. Steel*, 1786, 1 Leach, 452; *The State v. De Wolf*, 1830, 8 Conn. 93 (Am.); *Com. v. Hill*, 1817, 14 Mass. 207 (Am.).

³ See *R. v. Perkin*, 1840, 2 Moody, C. C. 139, where Alderson, B., observes:—"It certainly is not law that a child under seven cannot be examined as a witness. If he shows sufficient capacity on examination, a judge will allow him to be sworn." See, further, *R. v. Holmes*, 1861, 2 F. & F. 788, where a child six years old was allowed to testify as to a rape having been committed on her, she having stated to the judge (Wightman, J.) that she said her prayers, and thought it was wrong to tell lies.

⁴ By "The Indian Evidence Act, 1855" (Act ii. of 1855, § 14; now repealed by "The Indian Evidence Act, 1872"), it has been wisely provided that "children under seven years of age, who appear incapable of receiving just impressions of the

facts" to be deposed to, "or of relating them truly," ought not to be examined. The utter want of discretion in dealing with this subject, sometimes evinced by the inferior legal functionaries, is admirably ridiculed by Dickens in "Bleak House." A little crossing-sweeper being brought up before a coroner, to give evidence, the narrative thus proceeds:—"Name Jo. Nothing else that he knows on. . . . Knows a broom's a broom, and knows it's wicked to tell a lie. Don't recollect who told him about the broom, or about the lie, but knows both. Can't exactly say what'll be done to him arter he's dead, if he tells a lie to the gentleman, but believes it'll be something wery bad to punish him, and sarve him right—and so he'll tell the truth." 'This won't do,' gentlemen,' says the coroner, with a melancholy shake of the head. 'Don't you think you can receive his evidence, sir?' asks an attentive juryman. 'Out of the question,' says the coroner; 'you have heard the boy; can't exactly say won't do,

§§ 1377,
1378.

the testimony of children of *eight or nine years of age* when they appear to possess sufficient understanding. But in one case,¹ on an indictment for assaulting with intent to rape an infant, certainly under seven years of age,² and perhaps only five,³ all the judges held that she might have been examined upon oath, if, on strict examination by the court, she had been found to comprehend the danger and impiety of falsehood.⁴ In another case,⁵ however, the dying declarations of a child of four years of age were rejected, with the observation that, however precocious her mind might have been, it was quite impossible that she could have had sufficient understanding to render her declarations admissible. In certain cases, which will be found referred to elsewhere,⁶ it is provided by statute that unsworn evidence and depositions of children too young to understand the nature of an oath may with certain qualifications be admitted.

§ 1378. The law further places no reliance on testimony not given on oath or affirmation.⁷ Consequently, in general, no person, whatever functions he may have to discharge in relation to the cause in question, or whatever be his rank, age,⁸ country,⁹ or belief, can give testimony upon any trial, civil or criminal,¹⁰ until he have,

you know. We can't take *that* in a court of justice, gentlemen. It's *terrible depravity*. Put the boy aside.' Boy put aside; to the great edification of the audience; especially of little Swills, the comic vocalist." P. 104.

¹ *R. v. Brasier*, 1779, 1 Leach, C. C. 199; *Jackson v. Gridley*, 1820, 18 Johns. 98 (Am.).

² 1 Lea, 199.

³ 1 East, P. C. 443.

⁴ It is not quite clear whether a trial can legally be postponed to allow of religious instruction as to the nature of an oath being in the meanwhile afforded to a child who is offered as a witness. That it can be done, see *R. v. White*, 1786, 1 Leach, C. C. 430, n.; *R. v. Wade*, 1825, 1 Moody, C. C. 86. But the better opinion seems to be that this ought not to be done: see *R. v. Williams*, 1835, 7 C. & P. 320; *R. v. Nicholas*, 1846, 2 C. & K. 246 (Pollock, C.B.). And the matter is probably one entirely in the discretion of the

presiding judge. See *Com. v. Lynes*, 1886, 142 Mass. 577 (Am.).

⁵ Pike's case, 1829, 3 C. & P. 598 (Park, J., with concurrence of James Parke, J.).

⁶ As to depositions, see ante, § 491A, and as to evidence, post, §§ 1389c, 1389d.

⁷ As to affirmations, see post, §§ 1388-90.

⁸ *R. v. Brasier*, 1779, 1 Leach, C. C. 199, overruling the opinion of *Ld. Hale*. See 1 Hale, 634.

⁹ In some few British colonies, where the aborigines are "destitute of the knowledge of God and of any religious belief," ordinances have been made for the admission of the testimony of such persons without the previous sanction of an oath, and the legality of such ordinances has been established by the legislature. See 6 & 7 V. c. 22.

¹⁰ This law applies to courts-martial. See 44 & 45 V. c. 58, § 52, sub-sect. 3. A witness who commits perjury before a court-martial may, if

in the form prescribed by the law,¹ given an outward pledge that he considers himself responsible for the truth of what he is about to narrate, and rendered himself liable to the temporal penalties of perjury, in the event of his wilfully and corruptly giving false testimony.³

§§ 1378,
1379.

§ 1379. To return to the general principle that evidence is usually required to be on oath. In accordance with this principle, although each jurymen may apply to the subject before him the *general* knowledge which every man must be supposed to have, yet if he be personally acquainted with any special and material particular fact, he is not permitted to mention the circumstance privately to his fellows, but must be publicly sworn and examined, though there is no necessity for his leaving the box, or declining to interfere in the verdict.³ Similarly a judge, before whom a cause is tried, must conceal any fact relating to it which is within his own knowledge, unless he be first sworn;⁴ and consequently, if he be the sole judge, it seems that he cannot depose as a witness,⁵ though if he be sitting with others he may then be sworn and give evidence.⁶ In this last case, the proper course appears to be that the judge, who has thus become a witness, should leave the bench, and take no further judicial part in the trial,⁷ because he can

subject to military law, be punished by court-martial: § 29; but if not so subject, he must be prosecuted before a civil court: § 126, subsect. 2.

¹ See *Att.-Gen. v. Bradlaugh*, 1885, 14 Q. B. D. 667 (C. A.), as to the manner in which an oath is required to be taken.

² Where, however, a question arises in the course of a case, or on a subsequent appeal, as to a matter which has occurred within the knowledge of counsel in the case, such as the extent of an authority given to him by his client to compromise the litigation, the court will accept the statement of counsel made from his place at the bar without requiring it to be made on oath, *Kempshall v. Holland*, 1895, 14 R. 336 (C. A.), cited in *Hickman v. Berens*, [1895] 2 Ch. 638.

³ *R. v. Rosser*, 1836, 7 C. & P. 618; *Manley v. Shaw*, 1840, Car. & M. 361; *Bennet v. Hartford*, 1650,

Sty. 233; *Fitz-James v. Moys*, 1663, 1 Sid. 133; *R. v. Heath*, 1744, 18 How. St. Tr. 123; *R. v. Sutton*, 1816, 4 M. & Selw. 532.

⁴ *R. v. Anderson*, 1680, 7 How. St. Tr. 874; *Hurpurshad v. Sheo Dyal*, 1870, L. R. 3 Ind. App. 259 (P. C.).

⁵ *Ross v. Buhler*, 1824, 2 Mart. N. S. 312 (Am.). But see 11 How. St. Tr. 459.

⁶ *Trial of the Regicides*, 1660, Kel. 12.

⁷ *Id.* As to when judges are not compellable to testify, see ante, § 938. In addition to authorities there cited, see *R. v. Gazard*, 1838, 8 C. & P. 595 (Patteson, J.). A former editor of this work once saw Pollock, B., when called as a witness, exercise his privilege of refusing to give evidence of matters which passed before him judicially. A judge may, however, give evidence as to any collateral fact which happened in his presence during the pendency or after the

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1380.

hardly be deemed capable of impartially deciding on the admissibility of his own testimony, or of weighing it against that of another.¹ Nevertheless, on several occasions, on trials before the House of Lords, peers, who have been examined as witnesses, have, nevertheless, subsequently taken part in the verdict,² since peers are, in trials before the House of Lords, regarded at least as much in the light of jurors as of judges; and a juryman is not disqualified from acting, simply by being called as a witness.

§ 1380. Again, though a peer is privileged, while sitting in judgment, to give his verdict upon his honour,³ he cannot be examined as a witness in any cause, whether civil or criminal, or in any court of justice, whether it be an inferior court or the House of Lords, or in any manner, whether *vivâ voce*, or by interrogatories, or by affidavit, unless he be first sworn;⁴ for the respect which the law shows to the honour of a peer, does not extend so far as to overturn the settled maxim, that in *judicio non creditur nisi juratis*.⁵ If, therefore, he refuses to take the necessary oath or affirmation, he will, notwithstanding the privileges of peerage or of Parliament, be guilty of a contempt for which he may be committed and fined.⁶ On a civil trial in Ireland, where a Lord Lieutenant was examined at a trial on honour, instead of on oath, and examined and cross-examined, without any objection being taken to the reception of his evidence on a subsequent application for a new trial, made on the ground that unsworn testimony had been received, the court, having ascertained that the losing party

trial: *R. v. Earl Thanet*, 1799, 27 How. St. Tr. 845.

¹ *Ross v. Buhler*, 1824, 2 Mart. (N.S.) 312 (Am.) So is the law of Spain: Partid. 3, tit. 16, l. 19; 1 Moreau and Carleton's Tr. p. 200; and of Scotland: Glassf. Ev. 602; Tait, Ev. 432; Stair, Inst. lib. 4, tit. 45, 4; Ersk., Inst. lib. 4, tit. 2, 33.

² *R. v. Earl Powis, &c.*, 1678-85, as reported 7 How. St. Tr. 1384, 1458, 1552; *R. v. Earl of Macclesfield*, 1725, as reported 16 How. St. Tr. 1252, 1391.

³ 2 Inst. 49. And formerly, in Chancery had the (then) peculiar privilege of answering upon honour,

and without oath. See *Mears v. Id. Stourton*, 1711, 1 P. Wms. 146; Cons. Ord. Ch. 1860, Ord. XV. r. 6; now annulled by R. S. C. 1883. App. O.

⁴ See 2 How. St. Tr. 772, n.; 7 How. St. Tr. 1458; *R. v. Earl of Macclesfield*, 1725, 16 How. St. Tr. 1252; *R. v. Preston*, 1791, 12 How. St. Tr. 658; *Id. Shaftesbury v. Id. Digby*, 1676, 3 Keb. 631.

⁵ *Mears v. Lord Stourton*, 1711, 1 P. Wms. 146; *The Earl of Lincoln's Case*, 1626, 1 Bl. Com. 402; 3 Bac. Abr. 202.

⁶ 4 *Ld. Brougham's Speech*, 368.

had from the first been aware of the irregularity, held that the objection had been waived, and was too late,¹ and consequently discharged the rule.² §§ 1380—1382.

§ 1381. Even the Sovereign, it is said, could not now claim exemption from the rule requiring oral testimony to be given upon oath,³ though, on one occasion, the simple certificate of King James I., as to what had passed in his hearing, was received in the Court of Chancery.⁴ The question whether the Sovereign can be examined as a witness at all, seeing that the evidence would be without temporal sanction, admits of doubt. In the reign of Charles I., the Earl of Bristol, who was impeached for high treason, proposed to call the King, for the purpose of proving certain conversations which he had held with him while Prince. The subject was referred to the judges; but they, under His Majesty's direction, forbore from giving any opinion, and the question remains to this day undetermined.⁵ In the Berkeley Peerage case, counsel entertained some idea of calling the Prince Regent as a witness; but it ultimately became unnecessary to do so. On the whole, the better opinion seems to be, that the Sovereign, if so pleased, may be examined as a witness in any case, civil or criminal, but not without being sworn.⁶

§ 1382.⁷ The wisdom of requiring witnesses to be sworn, excepting under very special circumstances, cannot well be disputed. The ordinary definition of an oath,—viz., “a religious asseveration, by which a person renounces the mercy and imprecates the vengeance of Heaven, if he do not speak the truth,”⁸—may, indeed, be open to comment, since the design of the oath is, not to call the attention of God to man, but the attention of man to God;—not to call upon Him to punish the wrong-doer, but on the witness to remember that He will assuredly do so. Still, by laying hold of the conscience of a witness, the law best insures the utterance of truth.⁹ The repetition of the

¹ See *Richards v. Hough*, 1882, 51 L. J. Q. B. 361.

² *Birch v. Somerville*, 1652, 2 Ir. C. L. R. 243.

³ 2 Roll. Abr. 686; *Omichund v. Barker*, 1744-5, Willes, 550.

⁴ *Abignye v. Clifton*, 1612, Hob. 213.

⁵ 2 Ld. Campbell's *Lives of the Chanc.* 510, 511.

⁶ *Id.* in n.

⁷ Gr. Ev. § 323, in some part.

⁸ *R. v. White*, 1786, 1 Lea. C. C. 430, n.; *The Queen's case*, 1820, 2 B. & B. 287.

⁹ Tyler on Oaths, 12, 15. See a

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1383.**

words of an oath would, in the case of persons who do not believe in a Supreme Being, be, however, an unmeaning formality. The question remains whether such persons ought to be allowed to give testimony in courts of justice? The common law pronounces that persons who do not acknowledge a moral and religious accountability to such a Being, who will reward or punish, ought not to be sworn, as they must be insensible to the obligations of an oath.¹ But the Legislature has, in modern times, enacted that their testimony shall be received, for it is by the Oaths Act, 1888,² provided:³ "Every person upon objecting to being sworn, and stating, as the ground of such objection, either that he has no religious belief, or that the taking of an oath is contrary to his religious belief, shall be permitted to make his solemn affirmation instead of taking an oath in all places and for all purposes where an oath is or shall be required by law, which affirmation shall be of the same force and effect as if he had taken the oath; and if any person making such affirmation shall wilfully, falsely, and corruptly affirm anything which, if deposed on oath, would have amounted to wilful and corrupt perjury, he shall be liable to prosecution, indictment, sentence, and punishment in all respects as if he had committed wilful and corrupt perjury."⁴

§ 1383. Originally, the cases in which a resort to the provisions of this legislation was made were comparatively few, but their number has of late years largely increased. It is the duty of the presiding judge to himself ascertain by questioning any

definition of an oath by Coleridge, C.J., in *Att.-Gen. v. Bradlaugh*, 1885, 14 Q. B. D. 667. See, also, *Omichund v. Barker*, 1744-5, Willes, 550.

¹ B. N. P. 292; 1 Atk. 40, 45; *Maden v. Catanach*, 1862, 31 L. J. Ex. 118.

² 51 & 52 V. c. 46.

³ § 1. A very similar enactment with respect to witnesses summoned to give evidence before courts-martial had previously been inserted in the Army Act, 1881 (44 & 45 V. c. 58), § 52, sub-sect. 4. In India, every person who may by law be sworn, or called upon to make a solemn affirmation, in any capacity whatever, may, if he objects to such oath or

solemn affirmation, make in place thereof a simple affirmation, omitting the words "So help me God," "In the presence of Almighty God," or other expressions of the same nature: "The Indian Oaths Act, No. 6 of 1872."

⁴ § 2 directs that the form of oral declaration shall be as follows:—"I, A. B., do solemnly, sincerely, and truly declare and affirm." [*Then follow the words of the oath, omitting any imprecation or calling to witness.*] The validity of an oath is not to be affected by the person sworn having no religious belief: § 3. The form of affirmation in writing is also given in § 4 (set out *infra*, § 1389, n.).

witness who claims to affirm if he be entitled to do so.¹ To give vitality to the enactment contained in the Oaths Act, 1888: first, the person called as a witness must object to take an oath on the ground, and in the terms, set out in the Act; and secondly, he must also satisfy the presiding judge that he has no religious belief, or that the taking of an oath is contrary to it. A witness who states that he has a religious belief, but does not say that the taking of an oath is contrary thereto, cannot affirm.²

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1385.

§ 1384. To render competent a witness whose objection to being sworn has not been taken in accordance with the provisions in the Oaths Act, which regulate the mode of taking such an objection, it appears to be still necessary that such witness should be sworn in a manner which will be binding upon his conscience.³ The Oaths Act, 1888,⁴ does not contain, moreover, any provision making the evidence of an atheist, who does not *himself* object to be sworn, in any way receivable. But it provides,⁵ that “where an oath has been duly administered and taken, the fact that the person to whom the same was administered had at the time of taking such oath no religious belief, shall not for any purpose affect the validity of such oath.”

§ 1385.⁶ Defect of religious faith is, however, *never presumed*. Whatever opinions on religious subjects a man is proved to have once entertained, they are—unless a long interval has elapsed,⁷—presumed to continue unchanged till the contrary is shown.⁸ One mode, and perhaps the least objectionable mode, of proving that a witness is incompetent to take an oath, for want of religious belief, is by adducing evidence of atheistical declarations having been previously made by him to others.⁹ But the witness may

¹ Reg. v. Moore, 1892, 61 L. J. M. C. 80.

² Reg. v. Moore, 1892, 61 L. J. M. C. 80.

³ As to this see *infra*, § 1388. Before the Oaths Act, in the celebrated case of *Omichund v. Barker*, 1744-5, the proper test of the competency of a witness to be sworn was settled, upon great consideration, to be the belief in a God, and that he will—either in this world or in the next—reward and punish us according to our deserts. This rule was recognised in *Butts v. Swartwood*,

1823, 2 Cowen, 431 (Am.); *The People v. Matteson*, 1824, 2 Cowen, 433, 573 (Am.); and by Story, J., in *Wakefield v. Ross*, 1827, 5 Mason, 18 (Am.). See, as to the Scottish law, 2 Dickson, Ev. (Sc.) 849.

⁴ 51 & 52 V. c. 46.

⁵ § 3.

⁶ Gr. Ev. § 370, in part.

⁷ *Att.-Gen. v. Bradlaugh* (Ld. Coleridge), commenting on the above passage, 30th June, 1884.

⁸ *Ante*, § 197; *The State v. Stinson*, 1844, 7 Law Reporter, 383 (Am.).

⁹ See *Att.-Gen. v. Bradlaugh*, 1885,

§§ 1385--- himself be interrogated upon the subject, either before he is
 1388. sworn at all, or after he has been sworn upon the *voire dire*:¹
 or even, as it would seem, after having been sworn in the
 cause.²

§ 1386. The Evidence Act, 1851, provides that "Every court, judge, justice, officer, commissioner, arbitrator, or other person, now or hereafter having by law or by consent of parties authority to hear, receive, and examine evidence, is hereby empowered to administer an oath to all such witnesses as are legally called before them respectively."³ R. S. C., 1883, Order XXXVII., R. 19, provides that "any officer of the court, or other person directed to take the examination of any witness or person:" "each chief clerk of the Chancery Division, for the purpose of any proceedings directed to be taken before him;"⁴ and "the taxing officers of the Supreme Court, or of any Division thereof, for the purpose of any proceeding before them;"⁵ may respectively administer oaths. Order LXI. further provides by R. 5, that, "every master, and every first and second class clerk in the Filing and Record Department, shall, by virtue of his office, have authority to take oaths and affidavits in the Supreme Court." The Bankruptcy Act, 1883, provides first that Official Receivers "may, for the purpose of affidavits verifying proofs, petitions, or other proceedings under this Act, administer oaths;"⁶ and secondly, that, "for the purpose of any of his duties in relation to proofs, the trustee may administer oaths and take affidavits."⁷

§ 1387. The oath ought to be administered in a reverent manner. Indeed, the Consolidated General Orders of the Court of Chancery of 1860, contained an express rule to this effect.⁸

§ 1388.⁹ Unless he claims a right to affirm under some of the statutory provisions which have been already pointed out, every witness ought (as has been pointed out¹⁰) to be sworn according

14 Q. B. D. 667 (C. A.); as to the American law, 1 Law Reporter, pp. 347, 348; and 2 Dickson, Ev. (Sc.) 849, 850, 907, as to the Scottish law.

¹ R. v. White, 1786, 1 Lea. C. C. 430, n.; Maden v. Catanach, 1862, 31 L. J. Ex. 118.

² R. v. Taylor, 1790, Pea. R. 11; The Queen's case, 1820, 2 B. & B. 287.

³ 14 & 15 V. c. 99, § 16.

⁴ Ord. LV. r. 16. See, also, r. 17.

⁵ Ord. LXV. r. 27, sub-sect. 25.

⁶ 46 & 47 V. c. 52, § 68, sub-sect. 2.

⁷ Id., Sched. II. r. 26.

⁸ Ord. XIX. r. 14; repealed by Appendix O. to R. S. C. 1883.

⁹ Gr. Ev. § 371, in part.

¹⁰ Supra, § 1384.

to the peculiar ceremonies of his own religion, or in *such manner* as he *deems binding* on his conscience.¹ This doctrine of the civil law was, in the great case of *Omichund v. Barker*,² settled to also be the common law³ rule. It has, moreover, been provided by statute,⁴ that all persons shall be bound by the oaths which are lawfully administered to them, provided they are administered in such form, and with such ceremonies, as the parties sworn declare to be binding on their consciences. It has been further provided by the Oaths Act, 1888,⁵ that if any person to whom an

§ 1388.

¹ In *Morgan's case*, 1764, 1 Lea. C. C. 54, a Mahomedan was sworn thus:—First, he placed his right hand flat upon the Koran, put the other hand to his forehead, and brought the top of his forehead down to the book, and touched it with his head: he then looked for some time upon it, and, on being asked what that ceremony was to produce, he answered that he was bound by it to speak the truth. A Jew is sworn on the Pentateuch with his head covered (see note to *Omichund v. Barker*, 1744-5, Willes, 550); but if he professes Christianity, he may be sworn on the New Testament, though he has not formally renounced Judaism: *R. v. Gilham*, 1795, 1 Esp. 285. A Chinese is sworn by the ceremony of his breaking a saucer previously to the administration of the oath: *R. v. Entrehman*, 1842, C. & Marsh. 248. The formula of taking an oath, anciently adopted by the Romans, was as follows:—The witness held a flint stone in his right hand, and dropped it as he uttered these words: "Si sciens fallo, tum me Diespiter, salvâ urbe arceque, bonis ejiciat, ut ego hunc lapidem": *Adam's Ant.* 247; *Cic. Fam. Ep. vii.* 1, 12. Under the Christian emperors it was taken, invocato Dei Omnipotentis nomine: *Cod. lib. 2, tit. 4, l. 41. Sacrosanctis evangelii tactis: Cod. lib. 3, tit. 1, l. 14.* And Constantine adds, in a rescript, "Jurisjurandi religione testes, priusquam perhibeant testimonium, jamdudum arctari præcipimus": *Cod. lib. 4, tit. 20, l. 9.* Amongst Christians, Roman Catholics are, in England, usually sworn simply by the Evangelists, and upon a Testa-

ment, in the ordinary way, but they, in Ireland, are sworn on a Testament, with a crucifix or cross upon it: *M'Nally, Ev. (Ir.)* 97. "Quumque sit adseveratio religiosa, satis patet, jusjurandum attemperandum esse cujusque religioni": *Hein. ad Pand.* p. 3, §§ 13, 15. "Quadunque nomen dederis, id utique constat, omne jusjurandum proficisci ex fide et persuasione jurantis; et inutile esse, nisi quis credat Deum, quem testem advocat, perjurii sui idoneum esse vindicem. Id autem credat, qui jurat per Deum suum, per sacra sua, et ex sua ipsius animi religione," &c.: *Bynk. Obs. Jur. Rom. lib. 6, c. 2.* See, also, *Puff. lib. 4, c. 2, § 4.* And in Scotland, Covenanters and members of the Kirk are sworn by the form of holding up the right hand, without touching the book or kissing it, and by saying either, "I, A. B., swear by God himself, as I shall answer to him at the great day of judgment, that the evidence I shall give," &c.; or, "I swear according to the custom of my country and the religion I profess, that the evidence," &c.: *Mildrone's case*, 1786, 1 Lea. C. C. 412; *Walker's case*, 1788, 1 Lea. C. C. 498; *Mee v. Reid*, 1791, *Pea. R.* 23.

² 1744-5.

³ *Alderson, B.*, in *Miller v. Salomons*, 1852, 21 L. J. Ex. 161; and *Pollock, C.B.*, *id.*

⁴ 1 & 2 V. c. 105: see, also (as to the effect of its being shown that a witness, when sworn, had no religious belief) § 3 of the Oaths Act, cited *supra*, § 1384.

⁵ 51 & 52 V. c. 46, § 5, which Act applies to Scotland and Ireland.

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—1389.

oath is administered *desires* to swear “with uplifted hand,” in the form and manner common in Scotland,¹ he shall be entitled to do so. It should be noted (a fact which country administrators of the law occasionally forget) that a witness must “desire” this form of oath before its use becomes lawful—and that he cannot have the form thrust upon him.

§ 1388A. In order to ascertain what form of oath will be binding on him, the court should inquire this of the witness himself; and the proper time for making this inquiry is before he is sworn. If, however, the witness, without making any objection, takes the oath in the usual form, he may be afterwards asked whether he thinks it binding on his conscience; but if he answers in the affirmative, he cannot then be further asked, if he considers any other form of oath more binding.² Neither can a witness, who states that he is a Christian,³ or who claims to be sworn in Scotch fashion, be asked any further questions before he is sworn. The Oaths Act, 1888, provides that, if a witness be duly sworn, the fact that he has no religious belief shall not affect the validity of the oath,⁴ while if a man who is really of a different faith be sworn in the mode usual with the believers in any particular faith—for instance, if, being a Jew, he is sworn on the Gospels—the adverse party cannot for this cause have a new trial, since the witness is still punishable for perjury if he has sworn falsely.⁵

§ 1389. In addition to the recent relaxation of the law, by which persons who either have no religious belief, or with whom the taking of an oath is contrary to that religious belief, are enabled to give their evidence in an open court of law on affirmation,⁶ all persons are permitted to make a solemn declaration (in

¹ As to the Scotch form of oath, see the fifth preceding note.

² The Queen's case, 1820, 2 B. & B. 287.

³ R. v. Serva, 1845, 2 C. & K. 56.

⁴ See § 3 of 51 & 52 V. c. 46.

⁵ Sells v. Hoare, 1822, 3 B. & B. 232; The State v. Whisenhurst, 1823, 2 Hawks. 458 (Am.). See R. v. Wood, 1841, Jebb & B. vii. (Ir.). Whether a party will be entitled to a new trial, if a witness on the other side has testified without having been sworn at all, is a question depending upon circumstances. If the omission

of the oath was known at the time of the original trial, he will not: Birch v. Somerville, 1852, 2 Ir. C. L. R. 243, cited ante, § 1380; Lawrence v. Houghton, 1809, 5 Johns. 129 (Am.); White v. Hawn, 1810, 5 Johns. 351 (Am.). But if it was not discovered till after the trial, he will: Hawks v. Baker, 1829, 6 Greenl. 72 (Am.). See Richards v. Hough, 1882, 51 L. J. Q. B. 361.

⁶ See ante, §§ 1382, 1383. The present is a convenient place to mention that, in addition to the provisions already set forth, enabling

lieu of an oath) on various other occasions,¹ such as on making affidavits, &c. §§ 1389—1389c.

§ 1389A. Moreover, the members of certain sects² are by law permitted, both on giving their evidence in open court, and also on all occasions, to make a solemn affirmation instead of taking an oath. Thus, Quakers and Moravians are allowed to affirm in all cases where an oath is required;³ and, in consequence of a decision on the original Act conferring this right,⁴ the same privilege has been expressly extended⁵ to all persons who have been Quakers or Moravians, but have ceased to belong to either of those sects.⁶

§ 1389B. Two important exceptions to the general rule that all evidence must be upon oath or affirmation have been created (I.) By the Criminal Law Amendment Act, 1885,⁷ and (II.) By the Prevention of Cruelty to Children Act, 1894.⁸

§ 1389c. By the Criminal Law Amendment Act, 1885,⁷ it is made⁹ a felony punishable by penal servitude for life, or by imprisonment for two to five years, to have carnal knowledge of a girl under thirteen, and an attempt to do so is made a misde-

persons such as are mentioned in the text to give evidence in court upon affirmation, §§ 1 and 4 of "The Oaths Act, 1888," enable such persons to make statements in writing (otherwise affidavits) on affirmation in a form which commences:—"I, _____, of _____, do solemnly and sincerely affirm," and the "jurat" to which runs, "Affirmed, &c., this day of _____, 18 ____ . Before me, _____."

¹ By 5 & 6 W. 4, c. 62 ("The Statutory Declarations Act, 1835"), declarations may be substituted for the oaths, whether *official*, or *extra-judicial*, or *voluntary*, formerly in use; and any person who wilfully and corruptly makes and subscribes any such declaration, knowing it to be untrue in any material particular, is guilty of a misdemeanor.

² Those who interpret literally our Saviour's injunction, "Swear not at all," ignore the fact that Christ himself not only submitted to be sworn before the Sanhedrim, but actually refused to answer until he was put

upon his oath by the high priest. See, and compare, 5th Ch. of St. Matt. vv. 34—37, and 26th Ch. of St. Matt. vv. 59—64.

³ This is the form:—"I, A. B., being one of the people called Quakers, [or one of the persuasion of the people called Quakers, or of the United Brethren called Moravians, *as the case may be*,] do solemnly, sincerely, and truly declare and affirm," &c.

⁴ Doran's case, 1838, 2 Moo. C. C. 37.

⁵ By 1 & 2 V. c. 77.

⁶ This is the form:—"I, A. B., having been one of the people called Quakers, [or one of the persuasion of the people called Quakers, or of the United Brethren called Moravians, *as the case may be*,] and entertaining conscientious objections to the taking of an oath, do solemnly, sincerely, and truly declare and affirm," &c.

⁷ 48 & 49 V. c. 69.

⁸ 57 & 58 V. c. 27.

⁹ 48 & 49 V. c. 69, § 4.

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1389d.

meanor, punishable by a term of imprisonment not exceeding two years; and the section providing this then proceeds as follows:¹—"Where, upon the hearing of a charge under this section, the girl in respect of whom the offence is charged to have been committed, or any other child of tender years who is tendered as a witness, does not, in the opinion of the court or justices, understand the nature of an oath, the evidence of such girl or other child of tender years may be received, though not given upon oath, if, in the opinion of the court or justices, as the case may be, such girl or other child of tender years is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth: Provided that no person shall be liable to be convicted of the offence unless the testimony admitted by virtue of this section and given on behalf of the prosecution shall be corroborated by some other material evidence in support thereof implicating the accused."² Provided also, that any witness whose evidence has been admitted under this section shall be liable to indictment and punishment for perjury in all respects as if he or she had been sworn." And unsworn evidence given against a prisoner on a charge against him under the above section (§ 4) of the Act, in pursuance of that section, may, in pursuance of § 9 of the same Act, be used to convict him of an indecent assault.

§ 1389d. By the Prevention of Cruelty to Children Act, 1894,³ it is provided⁴ that where children are witnesses as to offences which are summarily punishable under such Act, the evidence of any child, in respect of whom the offence is charged to have been committed, or any other child of tender years, may, should one be tendered as a witness and appear not to understand the nature of an oath, be received, though it be not upon oath, if, in the opinion of the court, such child is possessed of sufficient intelligence to justify the reception of the evidence, and to understand the duty of speaking the truth. The section, however, requires that to justify a conviction such evidence be

¹ 48 & 49 V. c. 69, § 4.

² The fact that the accused when charged with an offence under the section refused to be examined by a doctor is not evidence corroborative

of the child's testimony within the meaning of the section: *Rex v. Gray*, 1904, 68 J. P. 328.

³ 57 & 58 V. c. 41.

⁴ *Id.* § 15.

corroborated by some other material evidence in support, implicating the accused.¹ The section also provides that a child who, under this provision, gives evidence which is false shall be liable to punishment.² §§ 1389d—1391.

§ 1390. The practice, though formerly different,³ now is that debtors and their wives, whether in England⁴ or in Ireland,⁵ may be examined upon oath by the Courts of Bankruptcy, concerning the debtor, his dealings, or property, and it appears that on the hearing of a bankruptcy petition, the petitioning creditor is entitled to call the debtor himself as a witness in support of the petition, for now that a debtor can petition for an adjudication of bankruptcy against himself, bankruptcy proceedings can no longer be considered as being of a quasi-criminal nature.⁶

§ 1391. All persons who, at *Nisi Prius*, being engaged in a cause as counsel, solicitor, or parties, had in that capacity actually addressed the jury on behalf of that side on which they were afterwards called upon to give evidence, were at one time supposed to be incompetent to *give testimony as witnesses* in such cause.⁷ But it has since been, on further investigation, judicially acknowledged that no such right to reject such a person as a witness exists,⁸ although the obvious inconvenience of permitting one and the same person, first, to state the case as an advocate, and next, to prove that statement as a witness, appears to furnish ample justification for its immediate adoption;⁹ and it is not only in all cases a most objectionable and reprehensible practice for the solicitor who is conducting a matter to himself also give evidence as a witness in it, but may even, under special circumstances, afford ground for a new trial.¹⁰ Private prosecutors have no right to address the jury,¹¹ even though they waive their title to give evidence on oath, and will not, under any

¹ 57 & 58 V. c. 41, sub-s. 1 (a).

² *Id.* sub-s. 1 (b).

³ 24 & 25 V. c. 134, § 211.

⁴ 46 & 47 V. c. 52, § 27.

⁵ 20 & 21 V. c. 60, §§ 306, 307, *Ir.*

⁶ See *In re X. Y.*, [1902] 1 K. B. 98.

⁷ *Stones v. Byron*, 1846, 16 L. J. Q. B. 32; *Deane v. Packwood*, 1846, 4 D. & L. 395, n. (Erle, J.). See

Best, Ev. 250—258.

⁸ *Cobbett v. Hudson*, 1852, 22 L. J. Q. B. 11.

⁹ *Id.*

¹⁰ Under what circumstances such a thing will be ground for a new trial, see *Deane v. Packwood*, 1846, 4 D. & L. 395, n.

¹¹ *R. v. Gurney*, 1869, 11 Cox, C. C. 414.

§§ 1391, 1392. circumstances, be permitted to act in the two-fold capacity of advocates and witnesses.¹

§ 1392. *An objection to the competency of a witness ought, in general, to be taken before the examination in chief. Indeed, it has been frequently said by judges, and sometimes held, that a party who is aware of the existence of any disqualification, cannot lie by and allow the witness to be examined, and afterwards object to his competency, if he should dislike his testimony.*² However, this doctrine has been disputed,³ and it has been held, in conformity with some old decisions,⁴ that the objection may be raised at any time during the trial, and that, too, whether the objector previously knew of the disqualification or not. Moreover, a judge acts rightly, who, having pronounced a witness competent on the *voire dire*,⁵ afterwards, on discovering during the examination that he was really incompetent, rejects his testimony, though part of it has already been reduced to writing.⁶ The rule on this subject is the same in equity as at law,⁷ and both in criminal and civil cases.⁸ In general, too, if an objection to the com-

¹ *R. v. Brice*, 1819, 2 B. & Ald. 606; *R. v. Milne*, undated, 2 B. & Ald. 606, n.; *Cobbett v. Hudson*, 1852, 22 L. J. Q. B. 11 (Ld. Campbell).

² *Dewdney v. Palmer*, 1839, 8 L. J. Ex. 148; *R. v. Watson*, 1817, 2 Stark. R. 139; *R. v. Frost*, 1839, 9 C. & P. 131; *Beeching v. Gower*, 1816, Holt, N. P. R. 314 (Gibbs, C.J.); *Howell v. Lock*, 1809, 2 Camp. 14; *Donelson v. Taylor*, 1829, 8 Pick. 390. In *Yardley v. Arnold*, 1842, 10 M. & W. 145, Parke, B., observed, "I cannot help wishing very much that it were established as the regular practice, that, when once a witness is sworn, no question should be put to him in order to raise objections to his competency; I think all such should be put to him on the *voire dire*; and that, when once sworn in chief, his competency should be taken for granted; but certainly the practice has been different hitherto." See, also, *Hartshorne v. Watson*, 1839, 5 Bing. N. C. 477; *Wollaston v. Hake-will*, 1841, 10 L. J. C. P. 303; and *Flagg v. Mann*, 1837, 2 Sumn. 487 (Am.).

³ *Jacobs v. Layborn*, 1843, 12 L. J. Ex. 427.

⁴ *Needham v. Smith*, 1704, 2 Vern. 463; Ld. Lovat's case, 1746, 18 How. St. Tr. 596. See, also, *Stone v. Blackburn*, 1793, 1 Esp. 37; *Yardley v. Arnold*, 1842, 10 M. & W. 145 (Parke, B.).

⁵ As to what this is, see next section.

⁶ *R. v. Whitehead*, 1866, L. R. 1 C. C. 33.

⁷ *Needham v. Smith*, 1704, 2 Vern. 463; *Vaughan v. Worrall*, 1817, 2 Madd. 322; *Selway v. Chappell*, 1841, 10 L. J. Ch. 323; *Swift v. Dean*, 1810, 6 Johns. 523 (Am.); *Gresl. Ev.* 234—236. See *Bousfield v. Mould*, 1847, 1 De G. & Sm. 347.

⁸ Ld. Lovat's case, 1746, 18 How. St. Tr. 596; *Com. v. Green*, 1822, 17 Mass. 538 (Am.). It has, however, already been pointed out (ante. § 1373) that in trials for high treason an objection under the Act of Anne must be taken before the witness is sworn. Qy. as to other objections in such trials as to the competency of witness, where, perhaps, the old law prevails.

petency of a witness be not taken until *after the trial*, it will be too late; and the courts will not grant a new trial for this cause alone,¹ unless the incompetency were known and concealed by the party producing the witness,² or there be other evidence of *mala praxis* on his part.³

§§ 1392,
1393.

§ 1393. In strictness, on an objection to his competency being taken, a witness ought to be examined upon the *voire* or *vraie dire*; that is he should be sworn to answer truly "all such questions as the court shall demand of him." This peculiar form of oath is, however, seldom now administered; and the facts on which the objection rests, if not admitted by the opposite side, are elicited by questions put to the witness after being sworn in chief.⁴ Upon such an examination, the witness, if it be necessary, may speak to the contents of written documents without producing them.⁵ The objection may perhaps be also supported by evidence aliundè.

¹ *Turner v. Pearte*, 1887, 1 T. R. 717; *Jackson v. Jackson*, 1825, 5 Cowen, 173 (Am.). But see *Jacobs v. Layborn*, 1843, as reported 11 M. & W. 691. In *Barbat v. Allen*, 1852, 21 L. J. Ex. 156, Parke, B., referred to the Irish case of *Birch v. Somerville*, 1852, 2 Ir. C. L. R. 243 (cited ante, § 1380), in which Ld. Clarendon was examined without being sworn, but the objection not having been insisted on at the time, the court refused to disturb the verdict.

² *Niles v. Brackett*, 1819, 15 Mass.

378 (Am.).

³ *Wade v. Simeon*, 1845, 2 C. B. 342.

⁴ See *Jacobs v. Layborn*, 1843, 12 L. J. Ex. 427.

⁵ See *Butler v. Carver*, 1818, 2 Stark. 433; *R. v. Gisburn*, 1812, 15 East, 57; *Lunniss v. Row*, 1839, 8 L. J. Q. B. 264; *Carlisle v. Eady*, 1824, 1 C. & P. 234; *Quarterman v. Cox*, 1837, 8 C. & P. 97; *Butchers' Co. v. Jones*, 1794, 1 Esp. 160; *Botham v. Swingler*, 1794, 1 Esp. 164; *Brockbank v. Anderson*, 1844, 13 L. J. C. P. 102.

CHAPTER III.

EXAMINATION OF WITNESSES.

§§ 1394,
1395.

§ 1394. Having treated of the means of procuring the attendance of witnesses, and of their competency and credibility, the next subject to be considered is their examination. Generally, "in the absence of any *agreement in writing* between the solicitors of all parties, and subject to the Rules of 1883, the witnesses at the *trial of any action*, or at any *assessment of damages*, shall be examined *vivâ voce and in open court*."¹ The agreement to dispense with *vivâ voce* testimony must be in writing, and, in strictness, is required to be made "between the solicitors of all parties." But if one of the parties has no solicitor, the stringency of the rule would probably be relaxed in his favour; and a similar relaxation would doubtless be allowed to a party under disability appearing by next friend or a guardian.² It also seems that, unless the agreement states that affidavits *alone* shall be used, either party may supplement the documentary proof by oral testimony.³ Moreover, notwithstanding the agreement, the court, where it is necessary for the interests of justice—for instance, if the rights of infants be involved in the inquiry—may, *ex meri motu*, altogether exclude affidavits, though duly taken and regularly filed, and direct that the witnesses shall themselves attend, and be orally examined in open court.⁴

§ 1395. In some cases, indeed, the R. S. C. of 1883 interfere with the general proposition stated in the last section. R. S. C., Ord. XXXVII, r. 1, provides, that "the court or a judge, may

¹ R. S. C. 1883, Ord. XXXVII. r. 1. See *Att.-Gen. v. M. D. Rail. Co.*, 1880, 5 Ex. D. 218 (C. A.).

² See *Knatchbull v. Fowle*, 1876, 1 Ch. D. 604; *Fryer v. Wiseman*,

1876, 45 L. J. Ch. 199.

³ *Glossop v. Heston, &c. Local Bd.*, 1878, 47 L. J. Ch. 536.

⁴ *Lovell v. Wallis*, 1884, 53 L. J. Ch. 495. And see next note.

at any time for *sufficient reason*,¹ order that any particular fact or facts may be proved by affidavit; or that the affidavit of any witness may be read at the hearing or trial, on such conditions as the court or judge may think reasonable;² or that any witness whose attendance in court ought, for some sufficient cause, to be dispensed with, be examined by interrogatories or otherwise, before a commissioner or examiner. Provided that, where it appears to the court or judge that the other party *bona fide* desires the production of a witness for *cross-examination*, and that such witness can be produced, an order shall *not* be made authorising the evidence of such witness to be given by affidavit." In accordance with this last proviso, the court has refused to allow affidavits already used on an interlocutory application, to be read at the hearing, though it was proposed to supplement them by the oral evidence of the deponents and by their *cross-examination*.³

§ 1396. Moreover, R. S. C., Ord. XXXVIII., r. 1, provides, that, "upon any motion, petition, or summons, evidence may be given by affidavit; but the court or a judge may,⁴ on the application of either party, order the attendance for *cross-examination* of the person making any such affidavit."⁵ Under the latter portion of this rule, the right to *cross-examine* the deponent would, probably, continue, though the affidavit be withdrawn by the party who filed it.⁶ Moreover, it appears

¹ The Probate Division has declined to order the execution and attestation of a will to be proved in solemn form by affidavit, though none of the parties cited had appeared: *Cook v. Tomlinson*, 1876, 24 W. R. 851. Ord. XXX. r. 7 of the R. S. C. and r. 6 of the Commercial Rules provide for proving certain facts otherwise than by *vivâ voce* evidence. For the provisions of these rules, see *ante*, § 393A.

² Accordingly, an affidavit which was not included in the chief clerk's certificate, may, by leave, be read on the further consideration of an action of which there has been no trial: *Dessau v. Lewin*, 1887, 52 L. T. 609. On the hearing, however, of a summons adjourned into court from chambers, affidavits cannot be read

unless filed within the period allowed by the chief clerk: *Chifferiel v. Watson*, 1889, 58 L. J. Ch. 137.

³ *Blackburn Guard. v. Brooks*, 1877, 25 W. R. 57.

⁴ The making of an order or not is discretionary. See *Le Trinidad v. Browne*, 1887, 36 W. R. 138.

⁵ As to *cross-examination* in cases commenced by an originating summons, see *Alexander v. Calder*, 1885, 28 Ch. D. 457. Qy. whether deponents out of the jurisdiction, whose affidavits have been filed, can be required to be produced for *cross-examination*: *Concha v. Concha*, 1886, 11 App. Cas. 541 (H. L.); *The Parisian*, 1887, 13 P. D. 16.

⁶ See *Keogh v. Leonard*, 1877, Ir. R. 11 Eq. 365; *Re Quartz Hill Co.*,

§§ 1396— that an affidavit can be read, though the cross-examination is
 1396b. not concluded.¹

§ 1396A. By R. S. C., Ord. XXXVII., r. 2, "in default actions in rem, and in references in Admiralty actions, evidence may be given by affidavit." This rule differs from the last by omitting the proviso for the cross-examination of the deponents. R. S. C., Ord. XXXVIII., r. 28, however, provides that, "when the evidence is taken by affidavit, any party desiring to cross-examine a deponent, who has made an affidavit filed on behalf of the opposite party, may serve upon the party by whom such affidavit has been filed a notice in writing, requiring the production of the deponent for cross-examination at the trial, such notice to be served at any time before the expiration of fourteen days next after the end of the time allowed for filing affidavits in reply, or within such time as in any case the court or a judge may specially appoint; and unless such deponent is produced accordingly, his affidavit shall not be used as evidence, unless by the special leave of the court or a judge."² The party producing such deponent for cross-examination, shall not be entitled to demand the expenses thereof in the first instance from the party requiring such production."³ The party receiving notice under the above rule, is, by Rule 29, "entitled to compel the attendance of the deponent for cross-examination, in the same way as he might compel the attendance of a witness to be examined."⁴

§ 1396B. Whenever affidavits are used they must be "confined

Ex parte Young, 1882, 21 Ch. D. 642 (C. A.).

¹ *Lewis v. Janes*, 1886, 54 L. T. 260 (C. A.).

² This is not the exclusive penalty. See *Cornell v. Baker*, *infra*.

³ This provision applies to a cross-examination before an examiner or a chief clerk as well as one at the trial: *Backhouse v. Alcock*, 1885, 28 Ch. D. 669. Cf., however, *Knight v. Gardner*, 1883, 25 Ch. D. 297 (C. A.). Its effect is that the person producing the witness for cross-examination must bear the expense in the first instance. See *Mansel v. Clanricarde*, 1886, 54 L. J. Ch. 982. And this even though the witness be a party to the

cause: *Cornell v. Baker*, 1885, 29 Ch. D. 711. But it will not apply to a case where the deponent is cross-examined before the chief clerk at chambers, or before a special examiner, being confined to cross-examination before the court at the trial: *In re Knight*, *Knight v. Gardner*, 1883, 25 Ch. D. 297 (C. A.).

⁴ As to the practice in Chancery, where a cross-examination should be taken, see *Issard v. Lambert*, *In re Davies*, 1890, 44 Ch. D. 253; *In re Doré Gallery*, 1890, 62 L. T. 758; and as to subsequently filing further evidence, *Issard v. Lambert*, *In re Davies*, *supra*.

to such facts as the witness is able of his own knowledge to prove, except on interlocutory motions, on which statements as to his belief, *with the grounds thereof*, may be admitted."¹

§§ 1396b
—1396d.

§ 1396c. To check prolixity or scurrility in affidavits, it is provided, first, that "the costs of every affidavit, which shall unnecessarily set forth matters of hearsay, or argumentative matter, or copies of or extracts from documents, shall be paid by the party filing the same;"² and next, that "the court or a judge may order to be struck out from any affidavit any matter which is scandalous, and may order the costs of any application to strike out such matter to be paid as between solicitor and client."³ In addition to these powers, the court has an inherent power to take an unduly prolix or scandalous affidavit off the file.⁴

§ 1396d. To as far as possible protect the court from being deceived either by intentional and direct falsehood in affidavits, or by statements therein either designedly coloured, or accidentally mis-recited,⁵ the following rules have been made:—

"Every affidavit shall state the description⁶ and true place of abode of the deponent."⁷ The object of this is to enable the

¹ R. S. C., Ord. XXXVIII. r. 3. An affidavit of information and belief, founded on statements made to the deponent by an informant, who declined to repeat them on affidavit unless subpoenaed, was not admitted on an interlocutory motion, in a case where the informant might have been but was not subpoenaed, and no irremediable injury could result from the exclusion of the evidence: *In re Anthony Birrell Pearce & Co.*, [1899] 2 Ch. 50. The exception does not apply to a proceeding, which, though interlocutory in form, finally decides the rights of the parties; and if, in any such proceeding, an affidavit founded on information and belief be used, the party against whom it is adduced is not bound to contradict it, but may treat it as evidence which is not admissible: *Gilbert v. Endean*, 1878, 9 Ch. D. 259 (C. A.). An affidavit of information and belief which does not state the source of the information or belief, is wholly worthless and ought not to be re-

ceived as evidence in any shape whatever: *In re J. L. Young Manufacturing Co.*, [1900] 2 Ch. 753; *Lumley v. Osborne*, [1901] 1 K. B. 532; and see *Bidder v. Bridges*, 1884, 37 Ch. D. 406.

² R. S. C., Ord. XXXVIII. r. 3; *Walker v. Poole*, 1882, 21 Ch. D. 835; *Hill v. Hart-Davis*, 1884, 26 Ch. D. 470 (C. A.).

³ R. S. C., Ord. XXXVIII. r. 11.

⁴ *Hill v. Hart-Davis*, 1884, 26 Ch. D. 470 (C. A.).

⁵ See *D. of Northumberland v. Todd*, 1878, 7 Ch. D. 777.

⁶ In giving the "description" of a deponent, in many cases "gentleman" is not sufficient (see *In re Horwood*, 1886, 55 L. T. 373 (C. A.)), as *e.g.*, if deponent has a trade or profession: *Spaddacini v. Keary*, 1889, 21 L. R. Ir. 553. But it may be sufficient for filing purposes: *Spence v. Dodsworth*, [1891] 1 Ch. 657.

⁷ R. S. C., Ord. XXXVIII. r. 8. If this be omitted or illusory only,

§§ 1396d, party against whom the affidavit is used, to make enquiries
1396e. about the deponent.

"No affidavit having in the jurat or body thereof any interlineation, alteration, or erasure, shall without leave of the court or a judge be read or made use of in any matter depending in court, unless the interlineation or alteration (other than by erasure) is authenticated by the initials of the officer taking the affidavit, or, if taken at the Central Office, either by his initials or by the stamp of that office, nor in the case of an erasure, unless the words or figures, appearing at the time of taking the affidavit to be written on the erasure, are rewritten and signed or initialled in the margin of the affidavit by the officer taking it."¹

"Where an affidavit is sworn by any person who appears to the officer taking the affidavit to be illiterate or blind, the officer shall certify in the jurat that the affidavit was read in his presence to the deponent, that the deponent seemed perfectly to understand it, and that the deponent made his signature in the presence of the officer. No such affidavit shall be used in evidence in the absence of this certificate, unless the court or a judge is otherwise satisfied that the affidavit was read over to and appeared to be perfectly understood by the deponent."²

§ 1396e. All affidavits must be properly entitled in the court and cause. On the Crown side of the King's Bench Division they must be entitled "In the High Court of Justice, King's Bench Division."³ If sworn in England⁴ for the purpose of proceedings in the High Court, they must be sworn either before a judge, or a district registrar⁵ or a master, or the first or second clerk in the Filing or Record Department of the Central Office,⁶ or a chief clerk in the Chancery Division,⁷ or a Commissioner to

the affidavit will not be read: *Hyde v. Hyde*, 1889, 59 L. T. 523. "Stock Exchange stockbroker" is not sufficient for a stockbroker: *Levin v. Levin*, 1889, 60 L. T. 317.

¹ Ord. XXXVIII. r. 12. A master has no jurisdiction to authenticate alterations by initialling them: *In re Cloake*, 1891, 65 L. T. 455.

² Ord. XXXVIII. r. 13. As to what ought to satisfy a court or judge

see *Blenkarn v. Longstaffe*, 1885, 54 L. J. Ch. 516.

³ *R. v. Plymouth, &c. Ry.*, 1889, 37 W. R. 334.

⁴ As to affidavits sworn out of England, see Ord. XXXVIII. r. 6, cited ante, § 12.

⁵ Ord. XXXVIII. r. 4.

⁶ Ord. LXI. r. 5.

⁷ Ord. LV. r. 16.

examine witnesses,¹ or a Commissioner to administer oaths.² These last-named commissioners must also, in the jurat, "express the time when, and the place where," each affidavit has been taken, for "otherwise the same shall not be held authentic, nor be admitted to be filed or enrolled, without the leave of the court or a judge."³ Still, the rules do not require that the person administering the oath should, in addition to signing his name, add, in the jurat, his title as commissioner.⁴

§§ 1396e
—1397.

§ 1396f. By other Rules of the Supreme Court⁵ no affidavit shall be sufficient, if sworn before the solicitor acting for the party on whose behalf it is to be used, or before such solicitor's clerk, or partner, or agent, or correspondent, or before the party himself.

By yet another rule,⁶ original affidavits, before being used, must be delivered to the proper officer for the purpose of being stamped and filed; but after an affidavit has been filed, an office copy of it, if duly authenticated with the seal of the office, "may in all cases be used." Notwithstanding, however, this general language, an affidavit that has been filed "before issue joined in any cause or matter," cannot, without leave of the court or a judge, be received at the hearing or trial, unless, within a month after issue joined, or further time specially allowed, notice in writing of its intended use be given by the one party to the other.⁷

§ 1396g. Rules relating to affidavits, and corresponding in substance though not in words with those referred to in the last six sections, exist in the Bankruptcy Courts,⁸ and in divorce and matrimonial cases.⁹

§ 1397. The County Court Rules as to *vivâ voce* testimony and affidavit evidence are substantially the same as those of the

¹ Ord. XXXVII. r. 19.

² Ord. XXXVIII. r. 4. As to their duty on taking an affidavit, see *Bourke v. Davis*, 1890, 44 Ch. D. 110. There is no power to take off the file an affidavit sworn before a commissioner whose commission has not been superseded, though he has been struck off the roll of solicitors: *Ward v. Gamgee*, 1891, 65 L. T. 610.

³ *Id.* r. 5; *Eddowes v. Argentine Land Co.*, 1890, 59 L. J. Ch. 392.

⁴ *Ex parte Johnson*, Re Chapman, 1884, 26 Ch. D. 338 (C. A.); *Cheney v. Courtois*, 1863, 32 L. J. C. P. 116.

⁵ *Viz.*, Ord. XXXVIII. rr. 16, 17.

⁶ *Viz.*, Ord. XXXVIII. r. 15.

⁷ Ord. XXXVII. r. 24.

⁸ Bankruptcy Rules, 1883, rr. 39—50.

⁹ Rules in Div. & Mat. Causes, rr. 138—146, 188. See, also, rr. 52—55.

§§ 1397,
1398.

High Court, though expressed in different language. The C. C. Rules, 1908,¹ provide, that "except where otherwise provided by these rules, the evidence of witnesses on the trial of any action or hearing of any matter shall be taken orally *on oath*; and where by these rules evidence is required or permitted to be taken by affidavit, such evidence shall nevertheless be taken orally on oath, if the court, on any application before or at the trial or hearing, so directs." The rules further provide,² that "the judge may at any time for sufficient reason order that any particular fact or facts may be proved by affidavit, or that the affidavit of any witness may be read at the trial or hearing, on such conditions as he may think reasonable, or that any witness whose attendance in court ought for some sufficient cause to be dispensed with, be examined by interrogatories or otherwise before an examiner; provided that, where it appears to the judge that the other party *bonâ fide* desires the production of a witness for cross-examination, and that such witness can be produced, an order shall not be made authorising the evidence of such witness to be given by affidavit." It is also provided,³ that "where a party desires to use at the trial an affidavit by any particular witness, or an affidavit as to particular facts as to which no order has been made under Rule 2 of this Order he may, not less than four clear days before the trial, give a notice, with a copy of such affidavit annexed, to the party against whom such affidavit is to be used; and unless such last-mentioned party shall two clear days at least before the trial give notice to the other party that he objects to the use of such affidavit, he shall be taken to have consented to the use thereof, unless the judge otherwise orders; and the judge may make such order as he may think fit as to the costs of or incidental to, any such objection."⁴

§ 1398. Many tribunals,⁵ besides the High Courts of England

¹ Ord. XVIII. r. 1.

² Ord. XVIII. r. 2.

³ Ord. XVIII. r. 11.

⁴ See as to form and requisites of affidavits used in the county courts, C. C. Ord. XIX. rr. 1—14.

⁵ *Inter alia*, the Jud. Comm. of the Privy Council, 3 & 4 W. 4, c. 41 ("The Judicial Committee Act,

1833"), § 7; the Eccles. Cts., 17 & 18 V. c. 47; the Ct. of Adm. for Irel., 30 & 31 V. c. 114, § 50. Ir.; the Cts. of Bankr. in Engl., 46 & 47 V. c. 52, § 105, sub-sect. 5; and in Irel., 20 & 21 V. c. 60, § 369, Ir. See, too, Reg. Gen. of 1877 for Consist. Ct. of Lond., Ord. IX. r. 1. cited 2 P. D. 378.

and Ireland, and the County Courts, have the power to examine witnesses *vivâ voce*. §§ 1398—1400.

§ 1399. The tendency at present unquestionably is to discountenance written evidence, and to substitute for it in all important inquiries testimony by word of mouth. When *vivâ voce* evidence is required, the *manner* in which witnesses ought to be *examined* lies chiefly in the discretion of the judge before whom the action is tried.¹ Very few positive rules have been laid down on the subject, save that the great object is to elicit the truth. The character, intelligence, courage, interest, bias, memory, and other circumstances of witnesses are, however, so various, as to require almost equal variety in the mode of interrogation, and the degree of its intensity.

§ 1400.² If the judge deem it essential to discovering the truth that the witnesses should be *examined out of the hearing of each other*, he will order them all on both sides to withdraw, excepting the one under examination.³ Such an order is, upon the application of either party at any period of the trial,⁴ rarely withheld, but it cannot be demanded of strict right.⁵ The parties will not usually be included in the order to withdraw, and indeed it is doubtful if they can be;⁶ in a modern case, however,⁷ it has been held that parties may be ordered out of court during the taking of the evidence, on the ground that the old rule as to not excluding parties originated when parties were considered

¹ *Bastin v. Carew*, 1824, Ry. & M. 127 (Abbott, C.J.).

² Gr. Ev. § 432, in part.

³ This order may, it seems, be made by an examiner. See *In re West of Canada Oil Land and Works Co.*, 1877, 6 Ch. D. 109.

⁴ *Southey v. Nash*, 1837, 7 C. & P. 632.

⁵ See *R. v. Cook*, 1696, 13 How. St. Tr. 348; *R. v. Vaughan*, 1696, 13 How. St. Tr. 535; *R. v. Goodere*, 1741, 17 How. St. Tr. 1015. In *R. v. Murphy*, 1837, 8 C. & P. 310, Coleridge, J., observed, that it was *almost* a matter of right for the opposite party to have a witness out of court, while any legal argument was going on respecting his evidence. The ruling in *Southey v. Nash*, 1837, 7 C. & P. 632, that either party had a

right to require that the unexamined witnesses should be out of court, would seem not to be law, even in civil cases. See *Selfe v. Isaacson*, 1858, 1 F. & F. 194. A witness will not be ordered out of court during the reading of affidavits which he has had an opportunity of previously perusing himself: *Penniman v. Hall*, 1875, 24 W. R. 245.

⁶ In *Charnock v. Dewings*, 1853, 3 C. & K. 378, Talfourd, J., is reported to have held that he had no power to order the parties to leave the court so long as they behaved with propriety. See, also, *Selfe v. Isaacson*, 1858, 1 F. & F. 194 (Byles, J.). See *qu.* as to this ruling.

⁷ *Outram v. Outram*, 1877, W. N. 75.

**§§ 1400,
1401.**

incompetent as witnesses. This decision has not been expressly overruled; but the invariable practice has been, and is, to allow parties to be present in court throughout the trial, and it is submitted that the decision would not be followed. A party who has not instructed counsel would not be in a position to conduct his case, if he were liable to be excluded from the court. It is clear that a commissioner or special examiner must, by the express terms of R. 11 of Order XXXVII., allow parties to be present in court throughout the examination if they wish to be present, notwithstanding the fact that they are witnesses.¹ It has, however, been held that the prosecutor in a criminal proceeding, in which it is proposed to examine him as a witness may be ordered out of court.² Where the solicitor in the cause is about to give testimony, an exception in his favour is usually allowed upon a statement by counsel that his personal attendance in court is necessary.³ Medical and other professional witnesses, summoned to give scientific opinions upon the circumstances of the case, as established by other testimony will be permitted to remain in court, until this particular class of evidence commences; but then, like ordinary witnesses, they will have to withdraw, and to come in one by one so as to undergo a separate examination.⁴

§ 1401.⁵ If a witness remains in court in contravention of an order to withdraw, he renders himself liable to fine and imprisonment for the *contempt*.⁶ At one time it was considered that the judge, in the exercise of his discretion, might even exclude his testimony.⁷ But it is now settled that the judge has *no right to reject the witness* on this ground, however much his wilful disobe-

¹ Hume-Williams and Macklin on Evidence on Commission, 2nd edit. p. 123.

² R. v. Newman, 1852, 2 Den. 390 (Ld. Campbell).

³ Everett v. Lowdham, 1831, 5 C. & P. 91; Pomeroy v. Baddeley, 1826, Ry. & M. 430 (Littledale, J.). But a special application must be made to except him: R. v. Webb, 1819, 3 Russ. C. & M. 622 (Best, J.).

⁴ And by Scotch law, even these are examined separately on matters of mere medical opinion. See Alison, Pract. Cr. L. (Sc.) 489, 542—545; Tait, Ev. 420.

⁵ Gr. Ev. § 432, in part.

⁶ Chandler v. Horne, 1842, 2 M. & Rob. 423.

⁷ Parker v. M'William, 1830, 6 Bing. 683; Thomas v. David, 1836, 7 C. & P. 350; R. v. Colley, 1827, M. & M. 329; Beamon v. Ellice, 1831, 4 C. & P. 585; R. v. Wyld, 1834, 6 C. & P. 380; R. v. Lavin, 1843, Ir. Cir. R. 813 (Perrin, J. and Richards, B.). The American decisions on the subject are not uniform, but appear substantially to agree with the English. See Greenleaf on Ev. 15th edit. (1892), at p. 567.

dience of the order may lessen the value of his evidence.¹ On the trial of *revenue cases*, a stricter rule is said to prevail; and to prevent any imputation of unfairness, the testimony of any witness who has remained in court, whether contumaciously or not, after an order to withdraw, has hitherto been inflexibly rejected.² This rule does not prevail in Ireland, at least, in all its strictness,³ and possibly would not now be rigidly enforced, even in England.

§§ 1401,
1402.

§ 1402. The practice of ordering witnesses out of court is noticed with approbation by Fortescue in his *De Laudibus Legum Angliæ*.⁴ The story of Susannah and the Elders in the *Apocrypha*,⁵ affords evidence of its utility. To render it properly efficient, it is not enough to order the witnesses simply to withdraw out of hearing, but they should be kept separate, and witnesses should be excluded from any opportunity, before they are themselves called, of conversing or communicating with those who have already been examined. In Scotland,⁶ all the witnesses on either side are usually shut up in an apartment by

¹ *Chandler v. Horne*, 1842, 2 M. & Rob. 423 (Erskine, J., who stated that it was so settled by all the judges). See, also, *Cook v. Nethercote*, 1835, 6 C. & P. 743; *Doe v. Cox*, 1790, 6 C. & P. 743 n.; *Cobbett v. Hudson*, 1852, 22 L. J. Q. B. 11.

² *Att.-Gen. v. Bulpit*, 1821, 9 Price, 4; *Parker v. M'William*, 1830, 6 Bing. 683; *Thomas v. David*, 1836, 7 C. & P. 350.

³ *Att.-Gen. v. Sullivan*, 1842, 1 Arm. M. & O. 294 (Ir.) (Brady, C.B.).

⁴ His words are:—"Et si necessitas exegerit, dividantur testes hujusmodi, donec ipsi deposuerint quicquid velint, ita quod dictum unius non docebit aut concitabit eorum alium ad consimiliter testificandum": C. 26. See, also, *Williams v. Hulie*, 1663, 1 Sid. 131; *Swift, Ev.* 512.

⁵ Where Daniel detected the perjury of the two old judges, who, as eye-witnesses, had accused the wife of Joacim of adultery; but who, on being examined apart, differed as to the place where the crime was committed, the one swearing it was under a mastick tree, the other under a holm

tree.

⁶ Formerly in Scotland, if a witness was objected to as having remained in court without permission, his evidence could not be heard; but 3 & 4 V. c. 59 ("The Evidence (Scotland) Act, 1840"), § 3, enacts, that "in any trial before any judge of the court of session or court of justiciary, or before any sheriff or steward of Scotland, it shall not be imperative on the court to reject any witness against whom it is objected that he or she has, without the permission of the court, and without the consent of the party objecting, been present in court during all or any part of the proceedings; but it shall be competent for the court, in its discretion, to admit the witness, where it shall appear to the court that the presence of the witness was not the consequence of culpable negligence or criminal intent, and that the witness has not been unduly instructed or influenced by what took place during his or her presence, or that injustice will not be done by his or her examination."

§§ 1402— themselves, whence they are successively and separately called
 1404. into court to be examined.¹ The system of separate examination prevails theoretically, if not practically, in both Houses of Parliament.²

§ 1403. When the competency of a witness, if objected to, is settled, he is sworn in the cause by the crier³ or other officer of the court. If he improperly decline either to take the proper oath,⁴ or to make the proper affirmation, or if, after having been sworn, he refuse to give evidence, or to answer any question which the court holds that he is bound by law to answer, he is guilty of contempt of court, and may be punished accordingly. When such an offence is committed before any Division of the High Court,⁵ the refractory witness may be punished *instante* by fine and imprisonment, and it is not necessary that the cause of commitment should be set out at length in the warrant.⁶ When it is committed before an inferior tribunal, the mode of dealing with the refractory witness in general depends upon the statutable powers with which the particular court is clothed.⁷ In all cases a refusal to discharge the duties of a witness is regarded as a grave offence, since it has a tendency to obstruct the course of public justice.

§ 1404.⁸ As soon as a witness has been duly sworn, the party by whom he is produced usually examines him.⁹ During this

¹ Alison, *Pract. of Cr. L. (Sc.)* 542—545; Tait, *Ev. (Sc.)* 420; 2 Hume, *Com.* 189; 19 How. *St. Tr.* 331, n.

² Taylor v. Lawson, 1828, 3 C. & P. 543 (Best, C.J., regretting that it is not universally followed).

³ R. v. Tew, 1855, Dears. C. C. 429.

⁴ If in an administration suit an accounting party be subpoenaed for examination, he cannot refuse to be sworn on the ground that he has not received sufficient notice of the points on which he is to be examined, but after being sworn he may,—according to what would seem to be an absurd rule,—object to answer for that reason: *Meyrick v. James*, 1877, 46 L. J. Ch. 579. See R. S. C. 1883, Ord. XXXIII., r. 5.

⁵ See *Ex parte Fernandez*, 1861, 30 L. J. C. P. 321; *Ex parte Clement*, 1822, 11 Price, 68.

⁶ See *Ex parte Fernandez*, 1861, 30 L. J. C. P. 321, where the witness was fined 500*l.* and sentenced to six months' imprisonment.

⁷ See as to the County Courts, § 111 of "The County Courts Act, 1888" (51 & 52 V. c. 43), enabling the judge to impose on the witness a fine not exceeding 10*l.*

⁸ Gr. Ev. §§ 432, 433.

⁹ Formerly in Scotch courts, as soon as a witness was sworn, it was necessary for the judge to examine him *in initialibus*, that is, to ask him whether he had been instructed what to say, or had received or had been promised any good deed for what he was to say, or whether he bore any ill-will to the adverse party, or had any interest in the cause, or concern in conducting it; together with his age, and whether he was married or

examination, called the witness's "direct examination," or "examination in chief," *leading questions* are not in general allowed to be put.¹ A "leading question" is one which suggests to the witness the answer desired,² or which embodying a material fact, admits of a conclusive answer by a simple negative or affirmative.³ This, however, must be understood in a reasonable sense. It therefore does not apply to the part of the examination which is introductory to that which is material.⁴ If, indeed, it were not allowed to approach the points at issue by such questions, examinations would be most inconveniently protracted. To abridge the proceeding, and bring the witness as soon as possible to the material points on which he is to speak, the counsel may lead him on to that point, and may recapitulate to him the acknowledged facts of the case, which have been already established. The judge may, too, in his discretion, allow leading questions to be put in a direct examination, and he will do so where, for instance, the witness, by his conduct in the box, obviously appears to be hostile to the party producing him, or interested for the other party, or unwilling to give evidence,⁵ or where special circumstances render the witness rather the witness of the court than of the party.⁶ Where a litigant is called as a witness by the opposite party the latter is not entitled as a matter

§ 1404.

not, and the degree of his relationship to the party adducing him: *Tait, Ev. (Sc.)* 424; but now this course is no longer necessary, though it is still competent for the judge, or for the party against whom the witness shall be called, to examine him *in initialibus*, as heretofore: 3 & 4 V. c. 59 ("The Evidence (Scotland) Act, 1840"), § 2.

¹ See Greenleaf on Ev. 15th edit. (1892) p. 569. As to what will be regarded as leading interrogatories, see *Gregory v. Marychurch*, 1850, 19 L. J. Ch. 289; *Lincoln v. Wright*, 1841, 28 L. J. Ch. 705. For an early instance of discussion as to whether a question was leading, see *R. v. Rosewell*, 1684, 10 How. St. Tr. 190.

² 1 St. Ev. 163; 2 Ph. Ev. 460; *Alison, Pract. of Cr. L. (Sc.)* 545; *Tait, Ev. (Sc.)* 427; 24 How. St. Tr. 659, 660, n.

³ *Nicholls v. Dowding*, 1815, 1

Stark. R. 81 (Ld. Ellenborough).

⁴ *Id.*

⁵ *Price v. Manning*, 1889, 42 Ch. D. 372 (C. A.); *R. v. Chapman*, 1838, 8 C. & P. 559; *R. v. Ball*, 1837, 8 C. & P. 745; *R. v. Murphy*, 1837, 8 C. & P. 310; *Clarke v. Saffery*, 1824, Ry. & M. 126; *Parkin v. Moon*, 1836, 7 C. & P. 409. See, also, 17 & 18 V. c. 125, § 22, post, § 1426. The mere fact that the interest of the witness is necessarily adverse to that of the party calling him does not, in England, make such a course a matter of right: *Price v. Manning*, 1889, 42 Ch. D. 372, supra; disapproving *Clarke v. Saffery*, 1824, Ry. & M. 126, contra. But it would appear to be otherwise in America: *Gr. Ev.* § 435.

⁶ See, for instance, *Bowman v. Bowman*, 1843, 2 M. & Kob. 501 (Cresswell, J.).

**§§ 1404,
1405.**

of right to cross-examine him as a hostile witness.¹ Questions which assume facts to have been proved which have not been proved, or that particular answers have been given which have not been given,² will not, at any time be permitted.

§ 1405. For the purpose of identification, too, a witness may be directed to look at a particular person, and say whether he is the man.³ Indeed, wherever,⁴ from the nature of the case, the mind of the witness cannot be directed to the subject of inquiry without a particular specification of it, questions may be put in a leading form. Accordingly, a witness called to contradict another respecting the contents of a lost letter, who cannot off-hand, recollect all its contents, may have the particular passage suggested to him, at least after his unaided memory has been exhausted.⁵ A witness who stated that he could not recollect the names of the members of a firm, so as to repeat them without suggestion, but that he might possibly recognise them if suggested, has been permitted to have this done;⁶ and a witness called to contradict another, who has denied having used certain expressions, may sometimes, by permission, be asked by counsel whether the particular words denied were not in fact uttered by the former witness.⁷ This permission will, however, it seems, only be given as to expressions which are not in themselves evidence in the cause: the object of relaxing the general rule being simply to exclude the other parts of the conversation, which would not be admissible.⁸ The court will, too, sometimes, allow a pointed or leading question to be put to a witness of tender years, whose attention cannot otherwise be called to the matter under investigation.⁹ Indeed, the judge has a discretionary power,—not controllable by the Court of Appeal,¹⁰—of relaxing the general rule, whenever, and under whatever

¹ *Price v. Manning*, *supra*.

² See *Hill v. Coombe*, 1818, cited 1 Stark. Ev. 188 n. (n); *Handley v. Ward*, 1818, cited 1 Stark. Ev. 188 n. (n); Gr. Ev. § 434.

³ *R. v. Watson*, 1817, 2 Stark. R. 139; *R. v. Berenger*, 1817, 2 Stark. R. 129 n.

⁴ Gr. Ev. § 435, in part.

⁵ *Courteen v. Touse*, 1807, 1 Camp. 43.

⁶ *Acerro v. Petroni*, 1815, 1 Stark. R. 100.

⁷ *Edmonds v. Walter*, 1820, 3 Stark. R. 8.

⁸ *Hallett v. Cousens*, 1839, 2 M. & Rob. 238.

⁹ *Moody v. Rowell*, 1835, 17 Pick. 490 (Am.).

¹⁰ See *Lawder v. Lawder*, 1855, 5 Ir. C. L. R. 27.

circumstances, and to whatever extent, he may think fit, though §§ 1405—
the power should only be exercised so far as the purposes of 1407.
justice plainly require.¹

§ 1406.² A witness is sometimes permitted to *refresh* and assist his *memory by the use of a written instrument*, memorandum, or entry in a book.³ This can, however,—except in the case of scientific witnesses referring to professional books as the foundation of their opinion⁴—be adopted only where the writing has been made, or its accuracy recognised, at the time of the fact in question, or, at furthest, so recently afterwards, as to render it probable that the memory of the witness had not then become defective.⁵ Accordingly, in a Scotch case, a witness was not allowed to consult notes, prepared by him *some weeks* after the transaction had occurred, and when he had reason to believe that he should be called to give evidence.⁶

§ 1407. Its own peculiar circumstances must govern each case raising this question. Usually, however, if the witness swears positively, that the notes, though made *ex post facto*, were taken down at a time when he had a distinct recollection of the facts there narrated, he will be allowed to use them, though drawn up

¹ Ohlsen v. Terrero, 1874, L. R. 10 Ch. 127 (C. A.); Moody v. Rowell, 1835, 17 Pick. 490 (Am.)

² Gr. Ev. §§ 436, 438, in part.

³ In America, it has been held that he can be *compelled* to do this. See Greenleaf on Ev. 15th edit. (1892), § 436, and notes. By the New York Civil Code, § 1843:—"A witness is allowed to refresh his memory respecting a fact, by anything written by himself, or under his direction, at the time when the fact occurred or immediately thereafter, or at any other time when the fact was fresh in his memory, and he knew that the same was correctly stated in the writing. But in such case the writing must be produced, and may be seen by the adverse party, who may, if he choose, cross-examine the witness upon it, and may read it to the jury. So, also, a witness may testify from such writing, though he retain no recollection of the particular facts; but such evidence must be received with caution." By § 159 of the Ind.

Ev. Act, 1872, "A witness may, while under examination, refresh his memory by referring to any writing made by himself at the time of the transaction concerning which he is questioned, or so soon afterwards that the court considers it likely that the transaction was at that time fresh in his memory. The witness may also refer to any such writing made by any other person, and read by the witness within the time aforesaid, if when he read it he knew it to be correct."

⁴ As to this practice, see post, §§ 1422, 1423.

⁵ R. v. Horne Tooke, 1794, 25 How. St. Tr. 120; Burrough v. Martin, 1809, 2 Camp. 112; Smith v. Morgan, 1839, 2 M. & Rob. 257; Wood v. Cooper, 1845, 1 C. & K. 645.

⁶ R. v. Sir A. Gordon Kinloch, 1795, 25 How. St. Tr. 937 (as held by the majority of the courts); Jones v. Stroud, 1825, 2 C. & P. 196.

**§§ 1407,
1408.**

a considerable time after the transactions had occurred.¹ If however, the memoranda were prepared subsequently to the event at the instance of the party calling the witness, or of his solicitor, they can in no case be permitted to be used, since a door might thus be opened to the grossest fraud. Accordingly, a witness who had drawn up a paper for the party calling him, after the cause was set down for trial, though eighteen months before the trial was actually heard, was not allowed to refer to it;² and the deposition of a witness who had, to refresh her memory, resorted to certain minutes drawn up at her request by the solicitor for the party she supported, as a digest, in the form of notes, at the time they took place, of certain transactions, though she had herself afterwards revised and transcribed such minutes, is said³ to have been suppressed by Lord Chancellor Hardwicke.

§ 1408. Whether, indeed, a witness can ever refresh his memory by referring to a mere *copy* of his original memorandum is a question of doubt.⁴ In several cases he has been allowed to do so, where, having looked at the copy, he was enabled to swear positively to the facts from *his own recollection*.⁵ Here, however, it must be presumed (though some of the reports are silent on the subject), that the copy from the notes of the witness was made either by himself, or by some person in his presence, or at least in such a manner as to enable the witness to swear to its accuracy.⁶ Even then, it may be questionable whether the copy should be used, so long as the original is in existence, and its absence unexplained; and there is much weight in the remark of Patteson, J., that the rule requiring the production of the best

¹ *R. v. Sir A. Gordon Kinloch*, 1795, 25 How. St. Tr. 937 (Sc.); *Wood v. Cooper*, 1845, 1 C. & K. 645. See, also, *Jones v. Stroud*, 1825, 2 C. & P. 196; § 1408.

² *Steinkeller v. Newton*, 1838, 9 C. & P. 313.

³ In *Anon.*, 1753, 1 Lew. 101 (Ld. Hardwicke as reported by Ld. Ashburton); cited by Ld. Kenyon in *Doe v. Perkins*, 1790, 3 T. R. 749. See *Sayer v. Wagstaff*, 1842, 13 L. J. Ch. 161.

⁴ By § 159 of "The Indian Evidence Act, 1872:"—"Whenever a witness may refresh his memory by

reference to any document, he may, with the permission of the court, refer to a copy of such document: provided the court be satisfied that there is sufficient reason for the non-production of the original."

⁵ *Tanner v. Taylor*, 1756, 3 T. R. 754 (Legge, B.); cited by Buller, J., in *Doe v. Perkins*, 1790, 3 T. R. 749; *Anon.*, 1827, 1 Moo. C. C. 101; *Duch. of Kingston's case*, 1776, 20 How. St. Tr. 540; *R. v. Hedges*, 1767, 23 How. St. Tr. 1367.

⁶ *Ld. Talbot v. Cusack*, 1864, 17 Ir. C. L. R. 213.

evidence is equally applicable, whether a paper be produced as evidence in itself, or be merely used to refresh the memory.¹ And in a case at Nisi Prius, a witness was not permitted to refresh his memory with the copy of a paper taken by himself *six months* after he made the original, though the original was proved to have become illegible; the judge observing, that the witness could only look at the original memorandum made *near* the time.² A solicitor has been allowed in a criminal case to look at his own account of his interviews with the prisoners, dictated by him to a shorthand clerk, and by the latter written out in longhand shortly after the interviews took place, and read over by the solicitor shortly afterwards, although the shorthand writer was alive and not called as a witness.³

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1410.

§ 1409. Be this general question as it may, it is clear, that if the copy be an imperfect extract, or be not proved to be a correct copy, or if the witness have no *independent* recollection of the facts narrated therein, the original must be used.⁴

§ 1410. But, apart from the question as to any distinction between originals and copies, to entitle a witness to refresh his memory by any memoranda, it is necessary that they should

¹ *Burton v. Plummer*, 1834, 2 A. & E. 341. See, also, *Jones v. Stroud*, 1825, 2 C. & P. 196.

² *Jones v. Stroud*, 1825, 2 C. & P. 196 (Best, C.J.).

³ *R. v. Dexter*, 1900, 19 Cox, C. C. (Grantham, J.).

⁴ *Doe v. Perkins*, 1790, 3 T. R. 749, explained (Patteson, J.) in *R. v. St. Martin's*, Leicester, 1834, as reported 2 A. & E. 215; *R. v. Hedges*, 1767, 28 How. St. Tr. 1367 (Ld. Ellenborough); *Solomons v. Campbell*, 1822, cited St. Ev. 183, n. (Abbott, C.J.); *Beech v. Jones*, 1848, 5 C. B. 696; *Alcock v. The Roy. Exch. Ins. Co.*, 1849, 18 L. J. Q. B. 121. In *Burton v. Plummer*, 1834, 2 A. & E. 341, the plaintiff's clerk, being called to prove the order and delivery of certain goods, sought to refresh his memory by some entries in a ledger, recording transactions in trade which had been noted by the clerk in a waste-book as they occurred, and day by day copied by the plaintiff into the ledger, each entry being at the time checked by the

clerk. The ledger was regarded as an original, and the witness allowed to refresh his memory thereby, without accounting for the absence of the waste-book. In *Horne v. Mackenzie*, 1839, 6 Cl. & Fin. 628 (H. L.), a surveyor was permitted to refresh his memory by a printed copy of a report furnished by him to his employers, and compiled from his original notes, of which it was substantially, though not verbally, a transcript. The report seems to have been treated in the light of an original document; and although it contained some marginal notes, made only two days before, it was still allowed to be used, these notes consisting of mere calculations, which the witness, if time were given him, could repeat without their aid. In *Topham v. Macgregor*, 1844, 1 C. & K. 320, the writer of a newspaper article was allowed to refresh his memory by the paper, his MS. being proved to be lost. See, also, *Ld. Talbot v. Cusack*, 1864, 17 Ir. C. L. R. 213.

§ 1410. have been made, either *by the witness himself*, or *by some person in his presence*,¹ or, at least, that he should have examined them while the facts were fresh in his memory, and should then have known that the particulars therein mentioned were correctly stated.² Under the last part of this rule, a seaman has been allowed to refer to a log-book, which, though not written by himself, had, from time to time, and while the occurrences were recent, been examined by him;³ a pay-clerk to look at a workman's time-book, which he has acted upon in paying the weekly wages;⁴ to prove the date of an act of bankruptcy, the court has several times permitted witnesses to refer to their depositions, taken shortly after the bankruptcy, though such depositions were of course not written by themselves, but merely signed by them;⁵ where a witness called on behalf of a prosecution makes a statement in his examination in chief inconsistent with what he has previously sworn before the magistrates or the coroner, the counsel for the Crown may show him his deposition, for the purpose of refreshing his memory, and may then repeat the question in a leading form;⁶ and a witness will always be allowed to look at the document itself if he has checked an entry made by another person;⁷ or has actually seen money paid and a receipt given;⁸ or has read a memorandum to a party who had assented to its terms.⁹ If the witness has become *blind*, the

¹ Duch. of Kingston's case, 1776, 20 How. St. Tr. 540.

² Compare the provisions of the New York Code, set out ante, § 1406, n.

³ Burrough v. Martin, 1809, 2 Camp. 112 (Ld. Ellenborough); Anderson v. Whalley, 1852, 3 C. & K. 54.

⁴ R. v. Langton, 1877, 2 Q. B. D. 296 (C. C. R.).

⁵ Smith v. Morgan, 1839, 2 M. & Rob. 257; Wood v. Cooper, 1845, 1 C. & K. 645; Vaughan v. Martin, 1796, 1 Esp. 440.

⁶ R. v. Williams, 1853, 6 Cox, C. C. 343. But counsel for the defence, in cross-examining a witness, may not place his deposition in his hand to refresh his memory without putting it in evidence: R. v. Ford, 1851, 5 Cox, C. C. 184. Under the

old law, a witness, having denied on cross-examination that he was ever sentenced to imprisonment, was not permitted to have his memory refreshed by a copy of his conviction: Meagoe v. Simmons, 1827, 3 C. & P. 75. As to the present law, see 28 & 29 V. c. 18, § 6, cited post, § 1437.

⁷ Burton v. Plummer, 1834, 2 A. & E. 341.

⁸ Rambert v. Cohen, 1803, 4 Esp. 213.

⁹ Ld. Bolton v. Tomlin, 1836, 5 A. & E. 856; Jacob v. Lindsay, 1801, 1 East, 460; R. v. St. Martin's, Leicester, 1834, 2 A. & E. 210. Witnesses are even reported to have been allowed to refresh their memories from the brief notes of counsel taken at a former trial, provided they could afterwards speak from recollection.

paper may be read over to him for the purpose of exciting his recollection.¹ §§ 1410—1412.

§ 1411. A writing, used to refresh the memory, does not thereby become evidence of itself.² Consequently, it is *not necessary* that it should even be *admissible*, and a document which cannot be read for want of a stamp, may be referred to by the witness in giving his evidence.³ Neither is it essential that notes used by a witness, who is called to prove a conversation, a speech, or the like, should contain a verbatim account of all that was uttered. Thus, a shorthand writer who had taken a verbatim note of such parts of an address as he deemed material, but was merely able to swear to the substantial correctness of the remainder, was permitted to read the whole.⁴

§ 1412. In order that a document may be used to refresh the memory, it is *not necessary* that the witness, after having seen it, should have any *independent recollection* of the facts mentioned therein, or connected therewith; but it will suffice if he remembers that he has seen the paper before, and that, when he saw it, he knew its contents to be correct; or even if, entirely forgetting the circumstances themselves, and the fact of his having seen the paper, he can still, in consequence of recognising his signature or writing upon it, vouch for the accuracy of the memorandum, or swear to the particular fact in question. Accordingly, it is enough if the agent, who made a parol lease, and entered a memorandum of the terms in a book, states that he has no memory of the transaction save from the book, but that on reading the entry he entertains no doubt that the fact really

and not merely from the notes: *Lawes v. Reed*, 1835, 2 Lewin, C. C. 152 (Alderson, B., citing *Balme v. Hutton*, undated, as similar; and see, also, *Henry v. Lee*, 1814, 2 Chitty R. 124). These cases, however, can scarcely be regarded as authorities, being certainly inconsistent with that first cited, as well as with principle.

¹ *Catt v. Howard*, 1820, 3 Stark. R. 3; *Vaughan v. Martin*, 1796, 1 Esp. 440.

² *Alcock v. The Roy. Exch. Ins. Co.*, 1849, 18 L. J. Q. B. 121; *Payne v. Ibbotson*, 1858, 27 L. J. Ex. 341.

³ *Maugham v. Hubbard*, 1828, 8 B. & C. 14; *Jacob v. Lindsay*, 1801, 1 East, 460; *Rambert v. Cohen*, 1803, 4 Esp. 213; *Catt v. Howard*, 1820, 3 Stark. R. 3.

⁴ *R. v. O'Connell*, 1843, Arm. & T. 163. In this case, it was strongly urged that, as by the witness's own showing the note was a *partial* one, the fulness and consequent accuracy of which rested on his private opinion of the materiality of what was spoken, he was not entitled to use it at all, but was bound to depend on his memory alone.

§§ 1412,
1413.

happened;¹ if a barrister, called to prove that a witness had materially varied his account since the last trial, though he has no independent recollection of what took place on the former occasion, vouch the notes on his brief to which he refers to refresh his memory as accurate;² if a banker's clerk, on being shown a bill of exchange, which has his own writing upon it, knows from this, and is able to swear positively that it has passed through his hands;³ or if a witness, from seeing his own signature to the attestation of a deed, says that, though he has no recollection of the fact, he is sure that he saw the party execute it.⁴

§ 1413. In all cases where documents are used for the purpose of refreshing the memory of a witness, it is usual and reasonable,⁵—and if the witness has no independent recollection of the fact, necessary,—that they should be produced at the trial,⁶ and that the *opposite counsel* should have an *opportunity of inspecting them*, in order that on cross- or re-examination, he may have the benefit of the witness's refreshing his memory by every part.⁷ But it is not necessary for the adverse party to put in the document as part of his evidence, merely because he has looked at it, or has cross-examined the witness respecting entries which have been previously referred to.⁸ If, however, he goes further, and cross-examines as to other parts of the memorandum, it seems that he thereby makes it his own evidence.⁹ If a paper be put into the

¹ *R. v. St. Martin's*, Leicester, 1834, 2 A. & E. 210. See, also, *Haig v. Newton*, 1817, 1 Mill. R. 423; *Sharpe v. Bingley*, 1817, 1 Mill. R. 373; *Maugham v. Hubbard*, 1828, 8 B. & C. 14.

² *R. v. Guinea*, 1841, Ir. Cir. R. 167.

³ Gr. Ev. § 437, in great part, for seven lines.

⁴ *Maugham v. Hubbard*, 1828, 8 B. & C. 14; *R. v. St. Martin's*, Leicester, 1834, 2 A. & E. 210; *Russell v. Coffin*, 1829, 8 Pick. 143 (Am.); *Jackson v. Christman*, 1830, 4 Wend. 277 (Am.); *Pigott v. Holloway*, 1808, 1 Binn. 436 (Am.); *Smith v. Lane*, 1824, 12 Serg. & R. 84 (Am.); *Clark v. Vorce*, 1836, 15 Wend. 193 (Am.).

⁵ *R. v. Hardy*, 1794, 24 How. St.

Tr. 704. But it does not appear to be strictly necessary: *Kensington v. Inglis*, 1807, 8 East, 273; *Burton v. Plummer*, 1834, 2 A. & E. 341.

⁶ *Beech v. Jones*, 1848, 5 C. B. 696.

⁷ *Howard v. Canfield*, 1836, 5 Dowl. 417; *R. v. St. Martin's*, Leicester, 1834, 2 A. & E. 210; *Sinclair v. Stevenson*, 1824, 1 C. & P. 585; *Loyd v. Freshfield*, 1826, 2 C. & P. 325; *Dupuy v. Truman*, 1843, 2 Y. & C. 341; *Lord v. Colvin*, 1854, 23 L. J. Ch. 469.

⁸ *R. v. Ramsden*, 1827, 2 C. & P. 604 (Ld. Tenterden); *Gregory v. Tavernor*, 1833, 6 C. & P. 281; *Payne v. Ibbotson*, 1858, 27 L. J. Ex. 341.

⁹ *Gregory v. Tavernor*, 1833, 6 C. & P. 281. See *Stephens v. Foster*, 1883, 6 C. & P. 289.

hand of a witness, merely to prove handwriting, and not to refresh his memory,¹ or if, being given to the witness for the purpose of refreshing his memory, the questions founded upon it utterly fail, the opposite party is not entitled to see it, except § 1413.

¹ *Russell v. Rider*, 1834, 6 C. & P. 416; *Sinclair v. Stevenson*, 1824, 1 C. & P. 585; *Lord v. Colvin*, 1854, 23 L. J. Ch. 469. As to Scotch law, Alison, in his *Treatise on the Practice of the Criminal Law*, with reference to the law of Scotland, observes, "The rule is, that notes or memoranda made up by the witness at the moment, or recently after the fact, may be looked to in order to refresh his memory; but if they were made up at the distance of weeks or months thereafter, and still more, if done at the recommendation of one of the parties, they are not admissible. It is accordingly usual to allow a witness to look to memoranda made at the time, of dates, distances, appearances on dead bodies, lists of stolen goods, or the like, before emitting his testimony, or even to read such notes to the jury as his evidence, he having first sworn that they were made at the time and faithfully done. In regard to lists of stolen goods in particular, it is now the usual practice to have inventories of them made up at the time from the information of the witness in pre-cognition, signed by him, and libelled on as a production at the trial, and he is then desired to read them, or they are read to him, and he swears that they contain a correct list of the stolen articles. In this way much time is saved at the trial, and much more correctness and accuracy is obtained than could possibly have been expected, if the witness were required to state from memory all the particulars of the stolen articles, at the distance perhaps of months from the time when they were lost. With the exception, however, of such memoranda, notes, or inventories, made up at the time or shortly after the occasion libelled, a witness is not permitted to refer to a written paper as containing his deposition; for that would annihilate the whole advantages of parol evidence and *vivâ voce* examination, and convert a jury trial

into a mere consideration of written instruments. There is one exception, however, properly introduced into this rule, in the case of medical or other scientific reports or certificates, which are lodged in process before the trial, and libelled on as productions in the indictment, and which the witness is allowed to read as his deposition to the jury, confirming it at its close by a declaration on his oath, that it is a true report. The reason of this exception is founded in the consideration, that the medical or other scientific facts or appearances, which are the subject of such a report, are generally so minute and detailed that they cannot with safety be intrusted to the memory of the witness, but much more reliance may be placed on a report made out by him at the time when the facts or appearances are fresh in his recollection; while, on the other hand, such witnesses have generally no personal interest in the matter, and from their situation and rank in life, are much less liable to suspicion than those of an inferior class, or more intimately connected with the transaction in question. Although, therefore, the scientific witness is always called on to read his report, as affording the best evidence of the appearances he was called on to examine, yet he may be, and generally is, subject to a further examination by the prosecutor, or a cross-examination on the prisoner's part; and if he is called on to state any facts in the case, unconnected with his scientific report, as conversations with the deceased, confessions heard by him from the panel, or the like, *utitur jure communi*, he stands in the situation of an ordinary witness, and must give his evidence verbally in answer to the questions put to him, and can only refer to jottings or memoranda of dates, &c., made up at the time to refresh his memory, like any other person put into the box": pp. 540—542.

§§ 1413—
1415. sufficiently to enable him to recognise it if it be subsequently offered in evidence, or to re-examine upon it, and may not comment upon its contents.¹ Indeed, if under these circumstances he read it or comment on it, he may be required by his adversary to put it in.²

§ 1414. In general, and unless the case be one in which evidence of reputation is admissible,³ witnesses must speak only to *facts* within their own knowledge; and will not be permitted, —except under circumstances to be presently mentioned,⁴ —to express their *belief* or *opinion*. For instance, in an action for the price of goods supplied to a firm, where the question is, whether defendant held himself out to plaintiff as the only person composing the firm, a witness, who proves the giving of the order by the defendant, may not be asked with whom he dealt, since such a question was only a skilful mode of ascertaining the witness's opinion (which may be founded on hearsay evidence), but the only proper inquiry is as to the acts done;⁵ and in an action for slander, if the words used are alleged to have been spoken in a sense different from their ordinary meaning, a bystander cannot be asked, in the first instance, what he understood by them,⁶ but the proper course is to ask the witness whether there was anything to prevent the words from conveying the meaning which they ordinarily would convey to him; and then, if he states any facts which lead to the inference that they were used in a peculiar sense, a foundation will have been laid for the question, “What did you understand by those words?”⁷

§ 1415.⁸ But the law does not require a witness to speak even as to facts which are within his own knowledge⁹ with such *certainty* as to exclude all doubt; and if he has *any* personal recollection of the fact under investigation, he may state what he

¹ *Holland v. Reeves*, 1835, 7 C. & P. 705 (Alderson, B.); *Cope v. Thames Haven Dock Co.*, 1848, 2 C. & K. 757; *Peck v. Peck*, 1870, 21 L. T. 670; *R. v. Duncombe*, 1838, 8 C. & P. 369 (Id. Denman); *Lord v. Colvin*, 1854, 23 L. J. Ch. 469.

² *Palmer v. Maclear*, 1858, 1 S. & T. 149.

³ Ante, § 607.

⁴ Post, §§ 1416—1425.

⁵ *Bonfield v. Smith*, 1844, 2 M. & Rob. 519.

⁶ *D. of Brunswick v. Harmer*, 1850, 3 C. & K. 10.

⁷ *Daines v. Hartley*, 1848, 18 L. J. Ex. 81. See *Simmons v. Mitchell*, 1881, 6 App. Cas. 156.

⁸ Gr. Ev. § 440, in part.

⁹ As to evidence of reputation, see ante, § 607.

remembers, and leave the jury to judge of the weight of his testimony.¹ If, however, the impression on his mind be so slight as to justify a belief that it may have been derived from others, or may be some unwarrantable deduction of his own dull understanding or lively imagination, it will be rejected.²

§§ 1415,
1416.

§ 1416.³ On some particular subjects, positive and direct testimony is often unattainable. In such cases, a witness is allowed to testify as to his *belief* or *opinion*, or even to draw *inferences* respecting the fact in question from other facts which are within his personal knowledge. And a man who swears positively to a belief or a fact which he knows to be untrue, is liable to be convicted of perjury.⁴ Accordingly, it is common for witnesses to express their belief respecting the *identity* of persons and things, as also respecting the genuineness of disputed *handwriting*; ⁵ on a question whether a house agent was entitled to his commission, as on the sale of a house through his intervention, the purchaser may say whether he thought he should have bought the property if he had not obtained a card to view it from that agent: ⁶ and on a claim for damages in a suit for adultery,⁷ or in an action for breach of promise of marriage, any person who has been in a position to observe the mutual deportment of the parties, may give evidence as to his opinion, whether or not they were attached to each other.⁸ In America it has been determined, upon grave consideration (a decision which is in conformity with a doctrine which has always prevailed in our ecclesiastical courts),⁹ not only that a witness who has had opportunities of knowing and observing the conversation, conduct, and manners of a person whose sanity is in question, may

¹ Millar's case, 1772-3, 3 Wils. 427; Carmalt v. Post, 1837, 8 Watts, 411; R. v. Stafford, 1680, 17 How. St. Tr. 1378.

² Clark v. Bigelow, 1839, 4 Shepl. 246 (Am.).

³ Gr. Ev. § 440, in part.

⁴ R. v. Pedley, 1784, 1 Lea. C. C. 325 (Ld. Mansfield); Miller's case, 1772-3, 3 Wils. 427; Folkes v. Chadd, 1782, 3 Doug. 157; R. v. Schlesinger, 1847, 17 L. J. M. C. 29. The only difference is, that proof of the commission of the crime is more difficult in the one case than in the

other.

⁵ As to proof of handwriting, see post, §§ 1862 et seq.; Folkes v. Chadd, 1782, 3 Doug. 157.

⁶ Mausell v. Clements, 1874, L. R. 9 C. P. 139.

⁷ See 20 & 21 V. c. 85 ("The Matrimonial Causes Act, 1857"), § 33.

⁸ Trelawney v. Colman, 1817, 2 Stark. R. 193; M'Kee v. Nelson, 1825, 4 Cowen, 355 (Am.).

⁹ Wheeler v. Alderson, 1831, 3 Hagg. Ecc. 587.

**§§ 1416,
1417.**

depose as to his opinion or belief as to the sanity of the party, formed from such actual observation;¹ but also that the subscribing witnesses to a will, being placed about a testator to ascertain and judge of his capacity, may testify their opinions, with respect to his sanity at the time of executing the will.²

§ 1417.³ It is chiefly on questions of *science or trade* (where there often is a difficulty, and occasionally, an impossibility, of obtaining more direct and positive evidence), that persons of peculiar skill on the subject (sometimes called *experts*),⁴ are allowed to give their opinions in evidence as well as testify to facts. Thus, the opinions of medical men are constantly admitted, as to the cause of disease or death, or the consequences of wounds, or the treatment of sickness; and as to the sane or insane state of a person's mind, as collected from a number of circumstances, and as to other subjects of professional skill.⁵ The opinions of persons who have made the peculiarities of handwriting their special study are receivable as to their belief, whether the writing of an instrument was in a feigned hand, or as to whether two documents, supposed to have been written in a disguised hand, were written by the same person;⁶ antiquaries have been called to fix, by conjecture, the date of ancient handwriting;⁷ practical surveyors may express their opinions, whether certain marks on trees, piles of stone, &c., were intended as

¹ *Clary v. Clary*, 1841, 2 Iredell (Am.).

² *Chase v. Lincoln*, 1807, 3 Mass. 237 (Am.); *Poole v. Richardson*, 1807, 3 Mass. 330 (Am.); *Rambler v. Tryson*, 1821, 7 Serg. & R. 90 (Am.); *Buckminster v. Perry*, 1808, 4 Mass. 593 (Am.); *Grant v. Thompson*, 1822, 4 Conn. 203 (Am.); *Wogan v. Small*, 1824, 11 Serg. & R. 141 (Am.).

³ Gr. Ev. § 440, in part.

⁴ Substantially, the above description represents the definition of an "expert" given in note to *Carter v. Boehm*, 1766, contained in 1 Smith's Leading Cases, at p. 544 of 9th edit. One who has studied a subject carefully falls within this definition, though he has never practised it: *Greenleaf on Ev.* 15th edit. (1892), notes (r) and (d), on p. 577. The

question whether a person is an expert or not is usually one for the decision of the judge: *Id.* note (b). As to what matters are properly the subject of expert evidence, see text, and also, *Greenleaf on Ev.* 15th edit. (1892), p. 578. An expert may be cross-examined as to statements in scientific treatises with regard to the subjects as to which he is giving evidence. See *Darby v. Ouseley*, 1856, 25 L. J. Ex. 227.

⁵ 1 St. Ev. 175; *Tait, Ev.* 433; *R. v. Wright*, 1821, R. & R. 456; *Hathorn v. King*, 1811, 8 Mass. 371 (Am.); *Collett v. Collett*, 1838, 1 Curt. 687.

⁶ *Goodtitle v. Braham*, 1792, 4 T. R. 498.

⁷ *Tracy Peer.*, 1843, 10 Cl. & Fin. 191 (H. L.).

monuments of boundaries;¹ an accountant, who, although not an actuary, is acquainted with the business of life insurance, may give evidence as to the average and probable duration of lives, and the value of annuities;² the secretary of a fire insurance company, accustomed to examine buildings with reference to the insurance of them, and who, as a county commissioner, has frequently estimated damages occasioned by the laying out of railroads and highways, may testify his opinion, as to the effect, of laying a railroad within a certain distance of a building, upon the value of the rent, and the increase of the rate of insurance against fire;³ on a question whether a paper had contained certain pencil-marks, which were alleged to have been rubbed out, the opinion of an engraver, who has examined the paper with a mirror, is admissible, *valeat quantum*;⁴ seal-engravers may be called to give their opinions upon an impression whether it was made from an original seal, or from another impression;⁵ the opinion of an artist in painting is evidence respecting the genuineness of a picture;⁶ and probably a post-mark may be proved by the opinion of a clerk of the post-office, or of any one who has been in the habit of receiving letters with that mark.⁷

§ 1418.⁸ Again, on a question whether a bank, erected to prevent the over-flowing of the sea, has caused the choking up of a harbour, the opinions of scientific engineers, as to the effect of such an embankment upon the harbour, are admissible;⁹ naturalists, who have observed the habits of certain fish, may

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1418.

¹ *Davis v. Mason*, 1826, 4 Pick. 156 (Am.).

² *Rowley v. Lond. & N. W. Rail. Co.*, 1873, L. R. 8 Ex. 221.

³ *Webber v. East. Rail. Co.*, 1840, 2 Metc. 147. Where a point, involving questions of practical science, is in dispute before a court unaided by a jury or assessors, the court will advise a reference to an expert in that science for his opinion, and his report will be adopted by it: *Webb v. Manch. & Leeds Rail. Co.*, 1839, 4 My. & Cr. 120. And there is now in the High Court a power to refer such a case compulsorily: R. S. C. Ord. XXXVI. r. 5. In the County Court, a matter can only be referred by consent: "The County Courts

Act, 1888" (51 & 52 V. c. 43), § 104.

⁴ *R. v. Williams*, 1838, 8 C. & P. 284, 434.

⁵ Per *Id.* Mansfield, in *Folkes v. Chadd*, 1782, 3 Doug. 157.

⁶ In *Belt v. Lawes*, 1883, *Times*, 1883, Huddleston, B., allowed many R. A.'s to be called to express decided opinions hostile to the plaintiff's artistic claims.

⁷ *Abbey v. Lill*, 1829, 2 M. & P. 534; *Fletcher v. Braddyll*, 1821, 3 Stark. R. 64; *Woodcock v. Houldsworth*, 1846, 16 L. J. Ex. 49.

⁸ Gr. Ev. § 440, in part.

⁹ *Folkes v. Chadd*, 1782, 3 Doug. 157.

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1419.

state their opinions, as to the ability of the fish to overcome particular obstructions in the rivers which they are accustomed to ascend;¹ and the opinion of experienced officers is admissible respecting a question of military practice,² though no great weight is of necessity given to it. It is, in short, a general rule, that the opinion of witnesses possessing peculiar skill is admissible, whenever the subject-matter of inquiry is such that inexperienced persons are unlikely to prove capable of forming a correct judgment upon it without such assistance;³ in other words, when it so far partakes of the character of a science or art, as to require a course of previous habit or study, in order to obtain a competent knowledge of its nature.⁴

§ 1419. The opinions of skilled witnesses cannot, on the other hand, be received on a subject which does not require any peculiar habits or course of study in order to qualify a man to understand it.⁵ Thus, evidence is inadmissible to prove that one name,⁶ or one trade mark⁷ so nearly resembles another as to be calculated to deceive, or that the make up of one tin of coffee is so like another as to be calculated to deceive purchasers.⁸ So, also,⁹ witnesses are not permitted to state *their views on matters of moral or legal obligation*, or on the manner in which other persons would *probably have been influenced*, had the parties acted in one way rather than another.¹⁰ For instance, the opinions of medical practitioners as to whether a physician has honourably and faithfully discharged his duty to his medical

¹ Cottrill v. Myrick, 1835, 3 Fairf. 222 (Am.).

² Bradley v. Arthur, 1825, 4 B. & C. 292. See, also, Barnes v. Kettle, 1766, 2 Wills. 314.

³ M'Fadden v. Murdock, 1867, Ir. R. 1 C. L. 211.

⁴ 1 Sm. L. C. 544, note to Carter v. Boehm, 1766, 1 W. Bl. 593. For numerous other instances of the reception of expert evidence, see Greenleaf on Ev. 15th edit. (1892), § 440, and note thereto, on p. 483.

⁵ Id.

⁶ North Cheshire and Manchester Brewery Co. v. Manchester Brewery Co., [1899] A. C. 83 (H. L.).

⁷ Bourne v. Swan & Edgar, [1903] 1 Ch. 211 (Farwell, J.).

⁸ Payton & Co. v. Snelling, Lam-pard & Co., [1901] A. C. 308 (H. L.). The recent case of London General Omnibus Co. v. Lavell, [1901] 1 Ch. 135, appears to be in conflict with the principle here laid down and with the last three cited cases. In that case the C. A. (Ld. Alverstone, C.J., Rigby and Vaughan Williams, J.L.J.) appear to have held that the judge of first instance was wrong in deciding, upon a view only, that the get-up of two omnibuses was "calculated to deceive." See the remarks of Farwell, J., on this case in *Bourne v. Swan & Edgar*, supra.

⁹ Gr. Ev. § 441, in part.

¹⁰ Campbell v. Rickards, 1833, 5 B. & Ad. 840 (Ld. Denman).

brethren, cannot be admitted, since a jury are, on such a point, as capable of forming an opinion as the witnesses.¹ To put it briefly, a witness may not, on other than scientific subjects, be asked to state his opinion upon a question of fact which is the very issue for the jury, as, for instance, whether a driver is *careful*; a road *dangerous*, or an assault or homicide *justifiable*.² Nor may he be asked whether a clause in a contract restricting trade is reasonable or unreasonable, for this is a question for the judge.³

§§ 1419,
1420.

§ 1420. In some cases it is difficult to determine whether a particular question be one of a scientific nature or not, and, consequently, whether skilled witnesses may or may not pass their opinions upon it.⁴ Thus, in an action on a policy of insurance, can persons conversant with the business of insurance be asked their opinions whether facts withheld from the underwriter were material? In an action against an insurance broker for negligence, in not drawing, or in not altering, a policy according to instructions, can other brokers be called to state their opinions as to what the conduct of persons similarly situated ought to have been? The old Court of Queen's Bench said that in these cases such evidence cannot be received,⁵ but the old Court of Common Pleas that it can.⁶ In an action for a libel,⁷ however, imputing to plaintiff dishonourable conduct in withdrawing a horse which he had entered for a race, and against which he had betted, a witness for him having on cross-examination stated, that by the rules of the Jockey Club a man might bet against his own horse, and then withdraw him without assigning any reason, and that, in such a case, he would be

¹ *Ramadge v. Ryan*, 1832, 9 Bing. 333.

² See *Greenleaf on Ev.* (15th edit.), § 441, and American cases there cited.

³ *Haynes v. Doman*, [1899] 2 Ch. 13 (C. A.).

⁴ See generally on this question, *Greenleaf on Ev.*, 15th edit. (1892), p. 578.

⁵ *Campbell v. Rickards*, 1833, 5 B. & Ad. 840, relying on *Carter v. Boehm*, 1766, 1 W. Bl. 593; and *Durrell v. Bederley*, 1816, Holt, 283.

See, also, *Jefferson Ins. Co., v. Cotheal*, 1831, 7 Wend. 72 (Am.).

⁶ *Chapman v. Walton*, 1833, 10 Bing. 57, relying on *Rickards v. Murdock*, 1830, 10 B. & C. 527; and *Berthon v. Loughman*, 1817, 2 Stark. R. 258. See, further, 1 Sm. L. C. 539—545; *Lindenau v. Desborough*, 1828, 8 B. & C. 586.

⁷ *Greville v. Chapman*, 1844, 5 Q. B. 731. It is not probable that the courts would sanction any extension of the doctrine here propounded.

§§ 1420, 1421. entitled to receive the amount of the wager, it was held that he might, on re-examination, be asked his opinion respecting the morality of such conduct, with a view of arriving at the real meaning of the rules.

§ 1421. The opinions of scientific witnesses are admissible in evidence, not only where they rest on the personal observation of the witness himself, and on facts within his own knowledge, but even where merely *founded on the case as proved by other witnesses* at the trial.¹ But a witness cannot be asked his opinion respecting the very point which the jury are to determine. For instance, on a question whether a particular act, for which a prisoner is on his trial, were an act of insanity, a medical man, conversant with that disease, who knows nothing of the facts, but has simply heard the trial, cannot be broadly asked his opinion as to the state of the prisoner's mind at the time of the commission of the alleged crime; because such a question involves the determination of the truth of the facts deposed to, as well as the scientific inference from those facts.² Where, indeed, the facts are admitted, or not disputed, and the question thus becomes substantially one of science only, it may be convenient to allow the question to be put in the general form first mentioned, though it cannot be insisted on as a matter of right.³ The proper and usual form of question is to ask him whether, *assuming* such and such facts, the prisoner was sane or insane? The jury are then left to say whether the assumed facts exist or not.⁴ In the same way, on a question of navigation, a Master of the Trinity House, or other nautical witness, cannot in strictness be asked whether, after having heard the evidence, he thinks the ship was properly or improperly navigated;⁵ but he may be asked his opinion on the subject, assuming the facts stated in evidence to be true.⁶ Upon a

¹ *R. v. Wright*, 1821, R. & R. 456; *R. v. Searle*, 1831, 1 M. & Rob. 75; *Fenwick v. Bell*, 1844, 1 C. & K. 312; *Beckwith v. Sydebotham*, 1807, 1 Camp. 117; *Collett v. Collett*, 1838, 1 Curt. 687.

² *McNaghten's case*, 1843, 10 Cl. & Fin. 200 (H. L.).

³ *R. v. Wright*, 1821, R. & R. 456.

⁴ *Sills v. Brown*, 1840, 9 C. & P. 601. See, also, *Jameson v. Drinkald*, 1826, 12 Moore (C. P.) 148.

⁵ *Fenwick v. Bell*, 1844, 1 C. & K. 312; *Malton v. Nesbit*, 1824, 1 C. & P. 70. In appeals from an investigation ordered by the Board of Trade under "The Merchant Shipping Act, 1894" (57 & 58 V. c. 60, §§ 475, 479), as to a shipping casualty, the Court

question of seaworthiness, too, experienced shipwrights may give an opinion as to whether, assuming a ship to be in a state in which the one in question was sworn to be on a certain day, she could have been seaworthy when the policy was effected.¹

§ 1422. In cases where skilled witnesses are called to pronounce their opinions on some scientific question, they may refresh their memory by referring to professional treatises,² tables, calculations, lists of prices, and the like. For instance, an actuary may refer to "the Carlisle Tables," when called upon to give evidence respecting the value of an annuity on joint lives;³ an architect might, it is presumed, refresh his memory with any price list of generally acknowledged correctness. A physician may strengthen his recollection by referring to books which he considers to be works of authority; or may be asked, after such a reference, whether his judgment was or was not thereby confirmed—and this though medical books are not directly admissible in evidence.⁴ It does not, however, appear that this latter course has ever been directly sanctioned; though a medical witness has been asked whether, in the course of his reading, he has not found a certain mode of treatment prescribed; and has also been permitted, in explanation of the grounds of his opinion, to state that his judgment was in part founded on the writings of his professional brethren.⁵

§ 1423. Law being a science, the existence and meaning of the laws, both written and unwritten, and of the usages and customs of *Foreign States*, may, and indeed *must*, be proved by calling professional or official persons to give their opinions on the subject.⁶ Scotch Marriage Law has been so proved.⁷ An opinion was at one time entertained that all foreign *written* law

of Appeal, being advised by nautical assessors, will not permit experts to be called to give evidence on questions of nautical knowledge or skill: *The Kestrel*, 1881, 6 P. D. 182.

¹ *Beckwith v. Sydebotham*, 1807, 1 Camp. 117; *Thornton v. Roy. Ex. Ass. Co.*, 1791, Pea. R. 25.

² See post, § 1423, ad fin. By § 159 of "The Ind. Ev. Act, 1872," "An expert may refresh his memory by reference to professional treatises."

³ *Bowley v. Lond. & N. W. Rail.*

Co., 1873, L. R. 8 Ex. 221.

⁴ *Collier v. Simpson*, 1831, 5 C. & P. 74.

⁵ *Collier v. Simpson*, 1831, 5 C. & P. 74 (Tindal, C.J.).

⁶ See ante, §§ 5, 9, 48.

⁷ In the great case of *Dalrymple v. Dalrymple*, 1811, 2 Hagg. Cons. 54, Sir W. Scott, in his judgment, examines and sifts the depositions of eminent Scottish lawyers made in the case. See, also, *R. v. Povey*, 1853, 22 L. J. M. C. 19.

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1423.

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1424.

must be proved by a copy properly authenticated;¹ but this doctrine is now distinctly exploded;² the House of Lords,³ adopting a previous decision of the Court of Queen's Bench,⁴ having determined that whenever foreign written law is to be proved, that proof cannot be taken from a book, but must be derived from some skilled witness. For instance, on a question respecting the existence or meaning of a French law arising in a British court, it would not suffice to produce the Code Napoléon, because the court would not have organs to deal with and construe its provisions; but the assistance of foreign lawyers, who knew how to interpret it, must of necessity be prayed in aid.⁵ But a witness may, nevertheless, refresh and confirm his recollection of the law, or assist his own knowledge, by referring to text-books, decisions, statutes, codes, or other legal documents, or authorities; and if he describes these works as truly stating the law, they may be read, not as evidence per se, but as part and parcel of his testimony.⁶ When an expert, however, vouches a foreign code, an English court may construe it for itself.⁷

§ 1424. Before the judge can discover and declare the meaning of a foreign document, he must obtain, through the medium of skilled witnesses, first, a translation of the document; secondly, an explanation of any terms of art used in it; and thirdly, information on any special law, or on any peculiar rule of construction, of the foreign State affecting it. Aided by these lights, the court then proceeds to put a judicial construction upon the instrument.⁸

¹ *R. v. Picton*, 1806, 30 How. St. Tr. 536, 864; *Clegg v. Levy*, 1812, 3 Camp. 166; *Millar v. Heinrick*, 1815, 4 Camp. 115; *Freemoult v. Dedire*, 1718, 1 P. Wms. 431; *Boehlinck v. Schneider*, 1799, 3 Esp. 58.

² See, on this subject, *Ld. Brougham's sketch of Ld. Stowell, "Statesmen of the Time of G. 3,"* 2nd ser. 76.

³ *Sussex Peer.*, 1844, 11 Cl. & Fin. 114 (H. L.).

⁴ *Baron de Bode's case*, 1845, 8 Q. B. 245.

⁵ *Sussex Peer.*, 1844, 11 Cl. & Fin. 114 (H. L.) (*Ld. Brougham*). See,

also, *Ld. Nelson v. Ld. Bridport*, 1846, 8 Beav. 547 (H. L.) (*Ld. Langdale, M.R.*). See, too, *Cocks v. Purday*, 1846, 2 C. & K. 269; and *Bremer v. Freeman*, 1857, 1 Deane, Ecc. R. 192 (P. C.).

⁶ *Sussex Peer.*, 1844, 11 Cl. & Fin. 114 (H. L.); *Ld. Nelson v. Ld. Bridport*, 1846, 8 Beav. 547 (H. L.).

⁷ *Concha v. Murrietta*, 1889, 40 Ch. D. 543 (C. A.); *Bremer v. Freeman*, *supra*.

⁸ See *Duchess di Sora v. Phillips*, 1864, 33 L. J. Ch. 129 (H. L.). See, also, *The Stearine, &c. Co. v. Heintzmann*, 1864, 17 C. B. (N.S.) 60.

§ 1425. To render a witness competent to give evidence on a point of foreign law, he must, in general,¹ either be a *professional man* belonging to the country whose laws are in question, or he must hold *some official situation*, which presumes, because it requires, sufficient knowledge.² Accordingly, a judge, an advocate, a barrister or a solicitor, will be an admissible witness to prove the laws of his own country; an attorney-general though not a barrister, as is occasionally the case in some of our colonies, may be examined as a person *peritus virtute officii*;³ a Roman Catholic bishop, holding the office of coadjutor to a vicar-apostolic in this country, has, in virtue of that office, been considered as a person skilled in the matrimonial law of Rome, and therefore an admissible witness to prove that law; and on one occasion the testimony of a French *vice-consul* here was admitted at Nisi Prius⁴ to prove the law of France, as being the evidence of a person officially skilled,⁵ while the Probate Division has allowed Persian law to be proved by a Persian ambassador,⁶ and the marriage law of Hong Kong to be proved by a former governor of that colony;⁷ and in the same division in an exceptional case where the ordinary evidence could not be procured, a gentleman who, from his professional research and experience of the marriage laws of the colony in question, was in the opinion of the court sufficiently qualified, was permitted to give evidence as to the validity of a marriage in Malta, although he was neither a lawyer of that colony nor the holder of any official situation connected with it.⁸ But a Roman Catholic priest is not competent to prove the Scottish law of marriage, even where he has celebrated a marriage in that country, the validity of which has to be proved at the trial.⁹ Moreover, the law of a

§ 1425.

¹ See, however, *Wilson v. Wilson*, cited *infra*.

² *Sussex Peer.*, 1844, 11 Cl. & Fin. 114 (H. L.). Qy. whether a woman can be accepted as *peritus*: *Reg. v. Povey*, 1855, 22 L. J. M. C. 19. The competency of a witness on this subject is for the court: *Greenleaf on Ev.* 15th edit. (1892), p. 637, n. (b).

³ *Sussex Peer.*, 1844, 11 Cl. & Fin. 114 (H. L.) (Ld. Brougham); *R. v. Picton*, 1808, 30 How. St. Tr. 536, 564; *Ward v. Dey*, 1849, 33 L. J.

Q. B. 3, 254.

⁴ *Lacon v. Higgins*, 1822, 3 Stark. B. 178 (Ld. Tenterden).

⁵ *Sussex Peer.*, 1844, 11 Cl. & Fin. 114 (H. L.).

⁶ In goods of Dost Aly Khan, 1880, 49 L. J. P. 78.

⁷ *Cooper King v. Cooper King*, [1900] P. 65.

⁸ *Wilson v. Wilson*, [1903] P. 157.

⁹ *R. v. Savage*, 1876, 13 Cox, C. C. 178.

**§§ 1425,
1426.**

foreign country cannot be proved even by a jurisconsult if his knowledge of it be derived solely from his having studied it at a university in another country.¹ Neither can a barrister practising in the Privy Council prove the law of Canada, though an appeal lies from that country to the Privy Council.² And neither, as it seems, can a merchant or other person, who holds no official situation, and who is unconnected with the legal profession, be heard to expound the law, though the judge may be satisfied that he really possesses ample knowledge on the subject.³ A foreign *custom* or *usage* is, however, a matter of fact, (just as the existence of a custom or usage in this country), and therefore can be proved by any witness who is acquainted with the fact.⁴ Therefore, a London hotel-keeper, who was formerly a merchant and stockbroker at Brussels, can prove the mercantile usage in Belgium, with respect to the presentment of a promissory note made payable in a particular place.⁵

§ 1426. The question how far a party is at liberty to discredit his own witness was agitated for many years. But in 1854 an enactment was contained in the C. L. P. Act of that year,⁶ which is extended to Ireland by the Irish C. L. P. Act, 1856,⁷ and has been repeated in an Act of Parliament⁸ which is still in force, and applies "to all courts of judicature as well criminal⁹ as all others, and to all persons having by law or by consent of parties authority to hear, receive, and examine evidence,"¹⁰ whether in England or in Ireland. This enactment is to the following effect:—"A party producing a witness shall not be allowed to impeach his credit by general evidence of bad character; but he may, in case the witness shall, in the opinion of the judge, prove adverse,"¹¹

¹ *Bristow v. Sequeville*, 1850, 19 L. J. Ex. 289; *Re Bonelli*, 1875, 1 P. D. 69. See, however, *Wilson v. Wilson*, *supra*.

² *Cartwright v. Cartwright*, 1878, 26 W. R. 684.

³ *Id.* *Lyndhurst, C.*, stating the unanimous opinion of judges and peers in *Sussex Peer.*, 1844, 11 Cl. & Fin. 114 (H. L.), and overruling *R. v. Dent*, 1843, 1 C. & K. 97.

⁴ *Ganer v. Lanesborough*, 1790, 1 Peake, 8; explained by *Ld. Lyndhurst, C.* in *Sussex Peer.*, 1844, 11 Cl. & Fin. 114 (H. L.). See *Mostyn*

v. Fabrigas, 1774, 1 Cowp. 174; *Feau-berst v. Turst*, 1702, Prec. Ch. 207.

⁵ *Vander Donckt v. Thellusson*, 1849, 19 L. J. C. P. 12.

⁶ 17 & 18 V. c. 125, § 22, an ill-drawn provision (*Cockburn, C.J.*, 5 C. B. (N.S.)), repealed by "The Statute Law Revision Act, 1892" (55 & 56 V. c. 19), Sched.

⁷ 19 & 20 V. c. 102, § 98.

⁸ *Viz.*, 28 & 29 V. c. 18, § 3.

⁹ See *R. v. Little*, 1833, 15 Cox. C. C. 319.

¹⁰ § 1 of 28 & 29 V. c. 18.

¹¹ That is, "hostile" as distin-

contradict him by other evidence, or, by leave of the judge,¹ prove² that he has made at other times a statement inconsistent with his present testimony;³ but before such last-mentioned proof can be given, the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such statement."⁴

§§ 1426,
1427.

§ 1427. In civil cases, by R. S. C., Ord. XXXVI., r. 38, "The judge may, in all cases, disallow any question put in cross-examination of any party or other witness which may appear to him vexatious and not relevant to any matter proper to be inquired into in the cause or matter."⁵ Moreover, the enactment⁶ set out

guished from merely unfavourable. See *Greenhough v. Eccles*, 1859, 28 L. J. C. P. 160 (Williams and Willes, JJ.; dubit. Cockburn, C.J.). In *Dear v. Knight*, 1859, 1 F. & F. 433, Erle, J., apparently regarded a witness as "adverse" simply because he made a statement contrary to what he was called to prove. See, also, *Pound v. Wilson*, 1865, 4 F. & F. 301. A hostile witness has been defined as "one who from the manner in which he gives his evidence shows that he is not desirous of telling the truth to the court" (Wilde, J.O., in *Coles v. Coles*, 1866, L. R. 1 P. & D. 70). A party who calls his opponent cannot as a right treat him as hostile, the matter being solely in the discretion of the court: *Price v. Manning*, 1889, 42 Ch. D. 372 (C. A.).

¹ The judge's discretion under this section is absolute, and not the subject of appeal: *Rice v. Howard*, 1886, 16 Q. B. D. 681. See, also, *Faulkner v. Brine*, 1858, 1 F. & F. 254.

² Nevertheless, a party may, without the judge's opinion or leave, indirectly discredit his own witness by calling other relevant evidence which contradicts such witness: *Stephen*, Dig. Ev. note xlvii. See the point fully discussed, *Greenleaf* on Ev. 15th edit. (1892), § 444; and *Melluish v. Collier*, 1850, 19 L. J. Q. B. 493.

³ See *Reed v. King*, 1858, 30 L. T. 290; *Jackson v. Thomason*, 1862, 31 L. J. Q. B. 11; *Coles v. Coles*, 1866, L. R. 1 P. & D. 70. In *Ryberg*

v. Ryberg, 1863, 32 L. J. P. & M. 112, both Sir C. Crosswell and counsel on both sides apparently forgot the existence of this enactment.

⁴ Similarly, by the N. Y. Civ. Code, "The party producing a witness is not allowed to impeach his credit by evidence of bad character, but he may contradict him by other evidence, and may also show that he has made at other times statements inconsistent with his present testimony; but before this can be done the statements must be related to him, with the circumstances of times, places, and persons present; and he must be asked whether he has made such statements, and if so, allowed to explain them. If the statements be in writing they must be shown to the witness before any question is put to him concerning them." 15 & 16 V. c. 27, defines the Scotch law by enacting that "it shall be competent to examine any witness who may be adduced in any action or proceeding, as to whether he has on any specified occasion made a statement on any matter pertinent to the issue different from the evidence given by him in such action or proceeding; and it shall be competent in the course of such action or proceeding to adduce evidence to prove that such witness has made such different statement on the occasion specified."

⁵ As to cross-examination, see *infra*, § 1430, and also *Lever v. Goodwin*, 1887, 36 Ch. D. 1.

⁶ 28 & 29 V. c. 18.

**§§ 1427,
1428.**

in § 1426, being, as there stated, of general application, applies both to all the Divisions of the High Court in either England or Ireland, and to examinations before an examiner of them; since, however, an examiner has no power to determine questions as to the relevancy or adverse nature of the evidence of a witness, or, in other respects, to act as a judge, he cannot himself give leave under the Act to produce counter-evidence; but a special application for that purpose must be made to the court.¹ When an examiner has reason to believe that a party will seek to avail himself of the statutory power of discrediting his own witness, he should take down the particular questions, as well as the answers upon which counter-evidence may be required.²

§ 1428. As soon as the examination in chief of a witness, who has been called by either party, is closed, the other party has a right to *cross-examine* him. The exercise of this right³ is one of the most efficacious tests for the discovery of truth. By it, the situation of the witness with respect to the parties and to the subject of litigation, his interest, his motives, his inclination and prejudices, his character, his means of obtaining a correct and certain knowledge of the facts to which he bears testimony, the manner in which he has used those means, his powers of discernment, memory, and description, are all fully investigated and ascertained, and submitted to the consideration of the jury, who have an opportunity of observing his demeanour, and of determining the just value of his testimony. It is not easy for a witness, subjected to this test, to impose on a court or jury; for, however artful the fabrication of falsehood may be, it cannot embrace all the circumstances, to which a cross-examination may be extended.⁴

¹ Buckley v. Cooke, 1854, 24 L. J. Ch. 24 (Wood, V.-C.).

² Id.

³ Greenl. on Ev. 15th edit. (1892), § 446.

⁴ St. Ev. 186. On the subject of examining and cross-examining witnesses *vivâ voce*, Quintilian gives the following instructions:—"Primum est, nosse testem. Nam timidus terri, stultus decipi, iracundus concitari, ambitiosus inflari, longus protrahi potest: prudens vero et con-

stans, val tanquam inimicus et perversus, dimittendus statim, vel non interrogatione, sed brevi interlocutione patroni, refutandus est; aut aliquo, si continget, urbane dicto refrigerandus; aut, si quid in ejus vitam dici poterit, infamiam criminum destruendus. Probos quosdam et verecundos non aspere incessere profuit; nam sæpe, qui adversus insecutantem pugnassent, modestiâ mitigantur. Omnis autem interrogatio, aut in causâ est, aut extra causam.

§ 1429. The importance of cross-examination being so great, it is not surprising that questions should occasionally arise as to

§ 1429.

In causâ (sicut accusatori præcepimus,) patronus quoque altius, unde nihil suspecti sit, repetitâ percontatione, priora sequentibus applicando, sæpe eo perducit homines, ut invitis, quod prosit, extorqueat. Ejus rei, sine dubio, nec disciplina ulla in scholis, nec exercitatio traditur; et naturali magis acumine, aut usu contingit hæc virtus. . . . *Extra causam* quoque multa, quæ prosint, rogari solent, de vitâ testium aliorum, de suâ quisque, si turpitudine, si humilitas, si amicitia accusatoris, si inimicitia cum reo, in quibus aut dicant aliquid, quod prosit, aut in mendacio vel cupiditate lædendi deprehendantur. Sed in primis *interrogatio debet esse circumspecta*; quia multa contra patronos venuste testis sæpe respondet, eique præcipue vulgo favetur; tum verbis quam maxime ex medio sumptis; ut qui rogatur (is autem sæpius imperitus) intelligat, aut ne intelligere se neget, quod interrogantis non leve frigus est": Quintil. Inst. Orat. lib. 5, c. 7. Alison (Sc.) observes:—"It is often a convenient way of examining, to ask a witness, whether such a thing was said or done, because the thing mentioned aids his recollection, and brings him to that stage of the proceeding on which it is desired that he should dilate. But this is not always fair; and when any subject is approached, on which his evidence is expected to be really important, the proper course is to ask him what was done, or what was said, or to tell his own story. In this way, also, if the witness is at all intelligent, a more consistent and intelligible statement will generally be got, than by putting separate questions; for the witnesses generally think over the subjects on which they are to be examined in criminal cases so often, or they have narrated them so frequently to others, that they go on much more fluently and distinctly, when allowed to follow the current of their own ideas, than when they are at every moment interrupted or diverted by the examining counsel. Where a witness is evidently prevaricating, or concealing the truth, it is

seldom by intimidation or sternness of manner, that he can be brought, at least in this country, to let out the truth. Such measures may sometimes terrify a timid witness into a true confession; but in general they only confirm a hardened one in his falsehood, and give him time to consider how seeming contradictions may be reconciled. The most effectual method is to examine rapidly and minutely, as to a number of subordinate and apparently trivial points in his evidence, concerning which there is little likelihood of his being prepared with falsehood ready made; and where such a course of interrogation is skilfully laid, it is rarely that it fails in exposing perjury or contradiction in some parts of the testimony, which it is desired to overturn. It frequently happens that, in the course of such a rapid examination, facts most material to the cause are elicited, which were either denied, or but partially admitted before. In such cases, there is no good ground, on which the facts thus reluctantly extorted, or which have escaped the witness in an unguarded moment, can be laid aside by the jury. Without doubt they come tainted from the polluted channel through which they are adduced; but still it is generally easy to distinguish what is true in such depositions from what is false, because the first is studiously withheld, and the second is as carefully put forth; and it frequently happens, that in this way the most important testimony in a case is extracted from the most unwilling witness, which only comes with the more effect to an intelligent jury, because it has emerged by the force of examination in opposition to an obvious desire to conceal." Alison, Pract. of Cr. L. (Sc.), 546, 547. See, also, Evans on cross-exon. in his Append. to Poth. Obl., No. 16, Vol. 2, pp. 233, 234. Lord Bacon, in his Essay on Cunning, shrewdly observes,—"A sudden, bold, and unexpected question doth many times surprise a man, and lay him open. Like to him that, having

§ 1429. whether a witness has been so called by the one party as to entitle the other party to exercise this right. If a witness be called under a subpoena duces tecum, merely for the *purpose of producing a document*, which either requires no proof, or is to be identified by another witness, he need not be sworn, and if unsworn, cannot be cross-examined.¹ If, too, a witness be sworn under a mistake, whether on the part of counsel or of the officer of the court, and that mistake be discovered before the examination in chief has substantially begun, no cross-examination will be allowed.² Neither has the adverse party any right to cross-examine a witness, whose examination in chief has been stopped by the judge, after his having answered a merely immaterial question.³ On the other hand, to confer the right to cross-examine him, it is not necessary that a witness should have been actually examined in chief; for if he is a competent witness, intentionally called and sworn, the opposite party has, in strictness, a right of cross-examination, though the party calling him has declined to ask a single question.⁴ Again, it is not *usual*, except under special circumstances,⁵ to cross-examine witnesses simply called to speak to the character of a prisoner; but no rule of law expressly forbids it. Where a witness, in a civil action, is called and examined by the judge himself it is in his discretion whether or not cross-examination of the witness shall be permitted, but when evidence is given by a witness so called which

changed his name, and walking in Paul's, another suddenly came behind him and called him by his true name, whereat straightways he looked back." This "dodge" has been successfully practised on a deserter, who, —after solemnly asserting that he had never been a soldier,—betrayed his falsehood by obeying a sudden word of command to "stand at ease!" The late Ld. Abinger, whose powers as a cross-examining counsel were unrivalled, was fond of giving his juniors this advice,—“Never drive out two tacks by trying to hammer in one.”

¹ *Summers v. Moseley*, 1834, 3 L. J. Ex. 128; *Perry v. Gibson*, 1834, 11 L. J. Ex. 269; *Rush v. Smith*, 1834, 3 L. J. Ex. 355; *Davis v. Dale*, 1830,

4 C. & P. 335; *R. v. Murlis*, 1829, M. & M. 515; *Simpson v. Smith*, 1822, 2 Ph. Ev. 397; *Griffith v. Ricketts*, 1849, 19 L. J. Ch. 399.

² *Wood v. Mackinson*, 1840, 2 M. & Rob. 273; *Clifford v. Hunter*, 1827, 3 C. & P. 16; *Rush v. Smith*, 1834; *Reed v. James*, 1815, 1 Stark. R. 132.

³ *Creedy v. Carr*, 1835, 7 C. & P. 64.

⁴ *R. v. Brooke*, 1819, 2 Stark. R. 472; *Phillips v. Eamer*, 1795, 1 Esp. 357; *Reed v. James*, 1815, 1 Stark. R. 132; *Wood v. Mackinson*, 1840, 2 M. & Rob. 273. The same rule prevails in the Eccles. Courts: *Newton v. Ricketts*, 1848, 18 L. J. Q. B. 53.

⁵ *R. v. Hodgkiss*, 1836, 7 C. & P. 298.

is material, the party affected is usually allowed to cross-examine, though only as to such of the witnesses' answers as are material.¹ Any person, whether a party to the proceedings or not, who has made an affidavit, which has been filed for the purpose of being used before the court, becomes liable to cross-examination, and cannot be exempted from such liability by the subsequent withdrawal of the affidavit.²

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1430.

§ 1430. In criminal cases the prosecutor *usually* calls every witness whose name is on the back of the indictment. But he is not *bound* to do so.³ Even if he declines to call any such witness, he ought, however, to at least have him in court, so that he may be called for the defence, if wanted for that purpose, and the defendant is entitled to inspect the indictment to see the name of the witnesses; but the court cannot compel the prosecution to give their description or addresses.⁴ The judge, moreover, will, in his discretion, sometimes call any witnesses that have been omitted by the prosecution, in order to give the prisoner's counsel an opportunity to cross-examine them;⁵ and this in misdemeanors as well as in felonies,⁶ and in the case of every witness who has been sworn with the view of going before the grand jury, though he may not have been actually examined by that body.⁷ Indeed, in serious cases, the court will sometimes even direct persons, whose names do not appear on the back of the indictment, to be called as witnesses, if there is reason to believe that they are acquainted with the circumstances of the case, and are consequently capable of giving material evidence.⁸ A witness who is thus called by the judge at the instance of the prisoner, and has no question put to him by the prosecution,

¹ *Coulson v. Disborough*, [1894] 2 Q. B. 316.

² *Re Quartz Hill Co., Ex parte Young*, 1882, 21 Ch. D. 642 (C. A.); *R. S. C.* 1883, Ord. XXXVIII. r. 28, cited ante, § 1396A.

³ *R. v. Woodhead*, 1847, 2 C. & K. 520; *R. v. Flatley*, 1842, Ir. Cir. R. 445.

⁴ *R. v. Woodhead*, 1847, 2 C. & K. 520; *R. v. Cassidy*, 1858, 1 F. & F. 79; *R. v. Lacy*, 1848, 3 Cox, C. C. 517; *R. v. Gordon*, 1843, 12 L. J. M. C. 84.

⁵ *R. v. Simmons*, 1823, 1 C. & P. 84; *R. v. Whitbread*, 1823, 1 C. & P. 84, n.; *R. v. Taylor*, 1823, 1 C. & P. 84, n.; *R. v. Beezley*, 1830, 4 C. & P. 220; *R. v. Bull*, 1839, 9 C. & P. 22.

⁶ *R. v. Vincent*, 1839, 9 C. & P. 91.

⁷ *R. v. Bodle*, 1833, 6 C. & P. 186.

⁸ *R. v. Holden*, 1838, 8 C. & P. 609. See, also, *R. v. Chapman*, 1838, 8 C. & P. 559; and *R. v. Orchard*, 1838, 8 C. & P. 565; *R. v. Stroner*, 1845, 1 C. & K. 650.

§§ 1430,
1431.

becomes the prisoner's witness,¹ and the prisoner's counsel, though permitted to put questions in the nature of a cross-examination, cannot call witnesses to contradict his statement.² Neither, in such a case, can the counsel for the prosecution ask any question on re-examination, which does not arise out of the cross-examination;³ and, perhaps, if he has refused to call the witness, he will not be allowed to re-examine him at all.⁴ When two or more persons are tried on the same indictment and are separately defended, any witness called by one of them may be cross-examined on behalf of the others, if he gives any testimony tending to criminate them;⁵ and where two prisoners are tried together, and one gives evidence affecting the other, the other prisoner has a right of cross-examining him.⁶ The counsel, too, for the other prisoners are entitled in such a case to reply upon his evidence.⁷

§ 1431. In cross-examination, it is admitted on all hands, that *leading questions may in general be asked*;⁸ but this does not mean that the counsel may go the length of putting the very words into the mouth of the witness, which he is to echo back again;⁹ neither does it sanction the putting of a question assuming that facts have been proved which have not been proved, or that particular answers have been given, contrary to the fact.¹⁰ It has been laid down, that leading questions may always be put in cross-examination, whether a witness be unwilling or not.¹¹ But the rule that leading questions may always be put to a witness in cross-examination ought, it is submitted, to

¹ R. v. Woodhead, 1847, 2 C. & K. 520.

² R. v. Bodle, 1833, 6 C. & P. 186.

³ R. v. Beezley, 1830, 4 C. & P. 220.

⁴ R. v. Harris, 1836, 7 C. & P. 429.

⁵ R. v. Burdett, 1855, Dears. C. C. 431. So, in Lord v. Colvin, 1855, 24 L. J. Ch. 517, Kindersley, V.-C., after consulting all the equity judges, held that, before an examiner in chancery, one defendant might cross-examine another defendant's witness.

⁶ R. v. Hadmen, [1902] 1 K. B. 882.

⁷ R. v. Burdett, 1855, Dears. C. C. 431.

⁸ In Scotland leading questions

used not to be allowed in the cross-examination, any more than in the examination in chief: Burnet, Cr. L., c. 18, p. 465 (Sc.); 24 How. St. Tr. 660, n. But the modern practice of the Scottish courts on this point is similar to our own: 2 Dickson, Ev. 988 (Sc.).

⁹ R. v. Hardy, 1794, 24 How. St. Tr. 704.

¹⁰ Hill v. Coombe (Abbott, J.), and Handley v. Ward (Abbott, C.J.), both cited St. Ev. 4th edit. p. 157, n. d., as decided Spring Assizes. 1818.

¹¹ Parkin v. Moon, 1836, 7 C. & P. 409.

be also in some way qualified where the witness is evidently friendly to the party who is to cross-examine him, and hostile to the party calling him. It is no answer to this suggestion to say that the party, who originally called the witness, has brought the evil on his own head; for such an answer loses sight of the fact that a fraudulent witness may purposely conceal his bias in favour of one party, and thus induce the other to call him; or that the witness called may be an attesting witness, or other person whom it was necessary to examine in order to establish some technical part of the case. To allow such a witness to have the most favourable answers suggested to him through the medium of leading questions, is obviously unjust; though, no doubt, the evil is now mitigated, both at Nisi Prius,¹ and in the criminal courts,² by the rule which entitles the counsel, who opens the case on either side, to sum up the evidence, and to point out the unsatisfactory nature of any testimony thus procured. In America, the judge may, in his discretion, prohibit leading questions from being put in cross-examination to an adversary's witness, who shows a strong interest or bias in favour of the cross-examining party and needs only an intimation to say whatever is most favourable to his cause.³

§ 1432. Moreover, both in England and in Ireland the cross-examination is not limited to the matters upon which the witness has already been examined in chief, but extends to the whole case.⁴ Consequently, if a plaintiff calls a witness to prove the

§§ 1431,
1432.

¹ Ord. XXXVI. r. 36, of R. S. C. 1883, is:—"Upon a trial with a jury, the addresses to the jury shall be regulated as follows: the party who begins, or his counsel, shall be allowed at the close of his case, if his opponent does not announce any intention to adduce evidence, to address the jury a second time for the purpose of summing up the evidence, and the opposite party, or his counsel, shall be allowed to open his case, and also to sum up the evidence, if any, and the right to reply shall be the same as heretofore." The law in Ireland is somewhat similar: see 19 & 20 V. c. 102, § 21. See, also, *Hodges v. Ancrum*, 1855, 24 L. J. Ex. 257. This practice does not apply to the County Courts:

Dymoch v. Watkins, 1883, 10 Q. B. D. 451.

² 28 & 29 V. c. 18, § 2.

³ *Moody v. Rowell*, 1835, 17 Pick. 490 (Am.).

⁴ *May. and Corp. of Berwick-on-Tweed v. Murray*, 1850, 19 L. J. Ch. 281. So, now in Scotland, "in any action, cause, prosecution, or other judicial proceeding, civil or criminal, where proof shall be taken, whether by the judge or a person acting as commissioner, it shall be competent for the party, against whom a witness is produced, and sworn *in causa*, to examine such witness, not in cross only, but *in causa*," 3 & 4 V. c. 59 ("The Evidence (Scotland) Act, 1840"), § 4.

§§ 1432,
1433.

simplest fact connected with his case, the defendant is at liberty to cross-examine him on every issue, and, by putting leading questions to establish, if he can, his entire defence;¹ and this doctrine has been carried so far that even a person who is the substantial party in the cause, called by his adversary for the sake of formal proof only, is thereby made a witness for all purposes, and may be cross-examined as to the whole case.² In America, however, a party has no right to cross-examine any witness, except as to circumstances connected with matters stated in his direct examination; and if he wishes to examine him respecting other matters, must do so by making him his own witness, and by calling him, as such, in the subsequent progress of the cause.³

§ 1433. At least one English case⁴ may be cited to support the view that when a person is once entitled to cross-examine a witness, *this right continues through all the subsequent stages of the cause*, so that if he afterwards *recalls* the same witness to prove a part of his own case, he may interrogate him by leading questions, and treat him as the witness of the party who first adduced him. But this subject is nevertheless one upon which different opinions have been entertained. The general principle on which this course of examination is permitted, namely, that every witness is supposed to be inclined most favourably towards the party calling him, is scarcely applicable to a case where a person is equally the witness of both sides; and each party should, in common fairness, alternately have the right of cross-examining such a witness as to his adversary's case, while both should be precluded, in the course of the respective examinations in chief, from putting leading questions with regard to their own.⁵ In accordance with the views last expressed, in Ireland a plaintiff is allowed to cross-

¹ In *re Woodfine*, 1878, 47 L. J. Ch. 832, Fry, J., would not allow the defendant in an action for a legacy to cross-examine the plaintiff respecting an independent counterclaim, but directed him to recall the plaintiff as his own witness. *Sed qu.*

² *Morgan v. Brydges*, 1818, 2 Stark. R. 314; *R. v. Murphy*, 1841, 1 Arm. M. & O. 206 (Ir.) (Pennefather, C.J.).

³ *Philadelphia and Trenton Rail.*

Co. v. Stimpson, 1840, 14 Pet. 448 (Am.) (Supreme Court). See, also, *Harrison v. Rowan*, 1820, 3 Wash. 580 (Am.); *Ellmaker v. Buckley*, 1827, 16 Serg. & R. 77 (Am.). *Contra*, *Moody v. Rowell*, 1833, 17 Pick. 490 (Am.).

⁴ *Dickinson v. Shee*, 1801, 4 Esp. 67.

⁵ 1 St. Ev. 187; 2 Ph. Ev. 471. 472.

examine any of his own witnesses, on their being afterwards called on behalf of the defendant;¹ while in America² (and this is probably the best rule) it is established that the question is one for the discretion of the judge at the trial, and that in general his ruling upon it is not subject to review.

§ 1484.³ The rule which confines evidence to the points in issue, and excludes all proof of such collateral facts as afford no reasonable inference with respect to the principal matters in dispute,⁴ is not usually applied in cross-examinations with the same strictness as in examinations in chief; but great latitude of interrogation is sometimes permitted, when, from the temper or conduct of the witness, or from other circumstances, such course seems essential to the discovery of truth; or where the cross-examiner will undertake to show, at some subsequent stage of the trial, by other evidence, the relevancy of the question put.⁵ On this head it is difficult to lay down, or rather to apply, any precise general rule.⁶ Still, one or two subsidiary rules have been clearly established, and a due attention to these will enable the practitioner to define with tolerable certainty the limits within which questions on cross-examination must be confined.

§ 1484A. First, by a rule which has been set out in a previous section, the judge of the High Court may now disallow any questions put in cross-examination which may appear to him to be vexatious and not relevant to any matter proper to be inquired into in the cause or matter.⁷

§ 1485. Next, the answer of a witness to a question put in cross-examination respecting any fact *irrelevant to the issue*, with the exception of an answer to a question whether the witness has been convicted of a felony or misdemeanor,⁸ is conclusive, and evidence cannot be called on the other side to show that the answer is untrue,⁹ neither can an irrelevant question be put to a

¹ *Malone v. Spillessy*, 1842, Ir. Cir. R. 504. See, too, *Lord v. Colvin*, 1855, 24 L. J. Ch. 517, where S. P. ruled by *Kindersley, V.-C.*

² See *Greenleaf on Ev.* 15th edit. (1892), § 447, and notes thereto.

³ *Gr. Ev.* § 449, in part.

⁴ *Ante*, § 316 et seq.

⁵ *Haigh v. Belcher*, 1830, 7 C. & P. 389.

⁶ *Lawrence v. Baker*, 1830, 5 Wend. 305 (Am.).

⁷ R. S. C. Ord. XXXVI. r. 38, set out *ante*, § 1426.

⁸ *Post*, § 1437.

⁹ See *Baker v. Baker*, 1863, 32 L. J. P. & M. 145; *Harris v. Tippet*, 1811, 2 Camp. 637; *Ex parte Arnsby*, 1833, 2 Deac. & C. 213; *Goddard v. Parr*, 1855, 24 L. J. Ch. 783; In re

§§ 1435,
1436.

witness on cross-examination, for the mere purpose of *impeaching his credit by contradicting him*. Thus in a penal action for usury, previously to the repeal of the usury laws, a witness who was called to establish the offence alleged to have been committed in a contract made with himself having stated in answer to questions put in cross-examination, that certain other contracts made by him with other persons about the same time were not usurious, defendant's counsel was not allowed to further cross-examine him in order to draw an inference that the contracts were all of the same nature, and then contradict his statements as to them by extrinsic proof;¹ and on the trial of an issue, whether the defendant's manufactory emitted smoke prejudicial to the plaintiff's garden, where both parties had examined witnesses as to the effect of the works on neighbouring grounds, a witness, called by the defendant, who described several gardens in the neighbourhood as uninjured, having been asked in cross-examination whether he knew Glasgow field, and having answered that he did, but that "he never knew of any damage done there," was not allowed to be asked, "Whether he had known of any sum having been paid by the defendant to the proprietors of Glasgow field for alleged damage occasioned by the works?" for such question would have led to a new collateral inquiry, which, answered either way, could not affect the issue, or test the credit of the witness.²

§ 1436. Thirdly, with the view of *impeaching his character*, a witness may always be asked in cross-examination,³—though, as will be presently seen, he is not always compelled to answer,⁴—questions with regard to alleged *crimes* or other improper conduct on his part. Indeed, in this case, if the fact inquired into be relevant to the issue, it may be proved by other evidence although

Haggermacher's Patent, [1898] 1 Ch. 280.

¹ Spenceley v. De Willott, 1806, 7 East, 108.

² Tennant v. Hamilton, 1839, 7 Cl. & Fin. 122 (H. L.); affirming Lord Jeffrey's ruling at trial.

³ Harris v. Tippet, 1811, 2 Camp. 638; R. v. Yewin, 1811, 2 Camp. 639; R. v. Edwards, 1791, 4 T. R. 440; R. v. Barnard and R. v. James,

1823, cited in n., 1 C. & P. 86, 87; R. v. Watson, 1817, 2 Stark. R. 139. The cases of R. v. Lewis, 1802, 4 Esp. 225; Macbride v. Macbride, 1802, 4 Esp. 242; and R. v. Pitcher, 1817, 1 C. & P. 85, where questions tending to degrade the witness were not allowed to be put, cannot now be regarded as authorities.

⁴ Post, §§ 1453 et seq.

denied by the witness. If, however, it be irrelevant at common law, the answer of the witness, if he make any, must be regarded as conclusive; and whether he answers or not, no independent proof can be given to establish the truth of the imputation.¹ §§ 1436—1438.

§ 1437. But by a statute applying to "all Courts of Judicature, as well criminal as all others, and to all persons having, by law or by consent of parties, authority to hear, receive and examine evidence,"² whether in England or Ireland, it has been enacted that "a witness may be questioned as to whether he has been convicted of any felony or misdemeanor, and, upon being so questioned, if he either denies or does not admit the fact, or refuses to answer, it shall be lawful for the cross-examining party to prove such conviction."³ The statute applies, although the fact of such conviction be altogether irrelevant to the matter in issue in the cause;⁴ but when an accused is called as a witness on his own behalf in a criminal prosecution, it only applies under the conditions set out *ante*, at § 1372c. The Act just cited also provides that "a certificate containing the substance and effect only (omitting the formal part) of the indictment and conviction for such offence, purporting to be signed by the clerk of the court, or other officer having the custody of the records of the court where the offender was convicted, or by the deputy of such clerk or officer (for which certificate a fee of five shillings and no more shall be demanded or taken), shall, upon proof of the identity of the person, be sufficient evidence of the said conviction, without proof of the signature or official character of the person appearing to have signed the same."

§ 1438. Fourthly, it may be broadly laid down that where questions, put to a witness on cross-examination for the purpose

¹ *R. v. Watson*, 1817, 2 Stark. R. 139; *R. v. Rudge*, 1805, Peake, Add. Cas. 232; *Goddard v. Parr*, 1855, 24 L. J. Ch. 783. If the statement be material to the issue, although irrelevant, the witness if he swear falsely may be indicted for perjury, and any matter going to the credit of a material witness is material to the issue: *R. v. Baker*, [1895] 1 Q. B. 797.

² 28 & 29 V. c. 18, § 1.

³ *Id.* § 6. The reasons for such an

enactment are stated by the Com. Law Commiss., in their 2nd Rep., pp. 21, 22. In *New York*, a "witness must answer as to the fact of his previous conviction for felony." See Civ. Code, § 1854.

⁴ *Ward v. Sinfield*, 1880, 49 L. J. C. P. 696, which was a decision on 17 & 18 V. c. 125 ("The Common Law Procedure Act, 1854"), § 25 (now repealed), the language of which was almost identical with that of the section cited.

**§§ 1438,
1439.**

of directly testing his credit, relate to *relevant facts*, his answers may be contradicted by independent evidence; although, as we have seen, if questions are put with this object upon *irrelevant matters*, the answers given by the witness cannot be contradicted. The question, what matters connected with the witness are or are not *relevant*, has been discussed on a former page.¹ In addition to what is stated there, it should be observed, that inquiries respecting the previous conduct of a witness will almost invariably be regarded as irrelevant, if not connected with the cause or the parties. Therefore, if a witness be questioned on cross-examination respecting the commission of crimes by him on some former occasion, his answers must (except in the case of an actual conviction),² be taken as conclusive.³ This rule extends to parties to the record, when giving testimony, as well as to other witnesses; and therefore, where in an action for indecent assault, defendant is examined as a witness on his own behalf, and denies the charge, although he may be cross-examined with respect to alleged improprieties committed by him towards other persons, these collateral imputations can neither be disproved on the one hand, nor supported on the other, by independent evidence.⁴

§ 1439. The rule is founded on two reasons: first, that a witness cannot be expected to come prepared to defend, by independent proof, all the actions of his life; and next, that to admit contradictory evidence on such points would of necessity lead to inextricable confusion, by raising an almost endless series of collateral issues.⁵ The rejection of the contradictory testimony may indeed sometimes exclude the truth; but this evil, acknowledged though it be, is as nothing compared with the inconveniences that must arise were a contrary rule to prevail.⁶

¹ Ante, §§ 335 et seq.

² As to which, see *supra*, § 1437.

³ *Goddard v. Parr*, 1855, 24 L. J. Ch. 783.

⁴ *Tolman and Ux. v. Johnstone*, 1860, 2 F. & F. 66 (Cockburn, C.J., after consulting the other judges). See, also, *Baker v. Baker*, 1863, 32 L. J. P. & M. 145.

⁵ *Att.-Gen. v. Hitchcock*, 1847, 16 L. J. Ex. 259 (Parke and Alderson, BB.).

⁶ *Att.-Gen. v. Hitchcock*, 1847, 16 L. J. Ex. 259 (Rolfe, B.). The case of *Alcock v. The Royal Exchange Insurance Co.*, 1849, 18 L. J. Q. B. 121, forms no real exception to the above rule. There, in an action by a shipowner against underwriters on a policy of insurance, the plaintiff's claim to recover as for a total loss rested on the abandonment of the vessel by the captain. The captain was called as a witness for the plain-

§ 1440. Whether questions respecting the *motives, interest, or conduct* of a witness, as connected with the cause, or with either of the parties, are irrelevant, is a point on which the authorities are not consistent. On the one hand, it has been held to be relevant to the guilt or innocence of a person charged with a crime, to inquire of the witness for the prosecution, in cross-examination, whether he had not expressed feelings of hostility towards the prisoner;¹ that the like inquiry may be made in a civil action;² that in an action upon a promissory note, the execution of which is disputed, it is material to ask the subscribing witness, whether she was not plaintiff's kept mistress;³ and that on an indictment for rape, or for an attempt to commit that crime, the prosecutrix may, on cross-examination, be asked whether she had not on former occasions consented to the prisoner's embraces.⁴ In all these cases, if the witness under cross-examination deny the fact imputed, he is exposed to contradiction by other witnesses. On similar principles, there exists authority for contending that if, on cross-examination, witnesses for a prosecution deny having attempted to suborn several persons to give false evidence against a prisoner, proof that they have done so may be given.⁵

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1441.

§ 1441. On the other hand, it has been ruled in several modern cases that, if a witness deny that he has tampered with the other witnesses, evidence to contradict him cannot be received;⁶ that on a prosecution, where a witness called to character denies having ever said that the prisoner should be acquitted if it cost him 20*l.*, the prosecution must be satisfied with the answer;⁷

tiff, and, on cross-examination, denied that previous to the voyage insured against he had been an habitual drunkard. The evidence of witnesses to establish that fact was, however, held clearly admissible, as tending to show that the captain was not likely to have exercised a sound judgment in reference to the abandonment, and that, consequently, the judgment actually exercised by him was not entitled to any respect from the jury.

¹ *R. v. Yewin*, 1811, 2 Camp. 639.
² *Attwood v. Welton*, 1828, 7 Conn. 66 (Am.).

³ *Thomas v. David*, 1836, 7 C. & P.

350.

⁴ *R. v. Riley*, 1887, 18 Q. B. D. 481 (C. C. R.); *R. v. Martin*, 1834, 6 C. & P. 562; recognised by Kelly, C.B., and Byles, J., in *R. v. Holmes and Furness*, 1871, L. R. 1 C. C. R. 334. Secus, as to intercourse with other men, *infra*, § 1441.

⁵ *Id.* *Stafford's case*, 1680, 7 How. St. Tr. 1459; *The Queen's case*, 1820, 2 B. & B. 287 (H. L.). Recognised by Parke, B., in *Att.-Gen. v. Hitchcock*, 1847, 16 L. J. Ex. 259.

⁶ *R. v. Lee*, 1838, 2 Lew. C. C. 154; *Harris v. Tippet*, 1811, 2 Camp. 638.

⁷ *R. v. Lee*, 1838, 2 Lew. C. C. 154.

**§§ 1441,
1442.**

that, in a civil action, the defendants who sought to disparage the testimony of a witness of the plaintiff, by proving some circumstances indicating a hostile spirit towards themselves, could not do it; ¹ that, where the principal witness against a man indicted for theft, was his apprentice, who, in cross-examination, denied that he had been charged with robbing his master, prisoner's counsel could not prove that the answer was false; ² and on indictments for rape, or for an attempt to commit rape, or for indecent assault, that, though the principal female witness may be cross-examined with the view of showing that she has previously been guilty of incontinence with *other* men, yet her answers to such questions must be taken as conclusive, and her supposed paramours cannot be called as witnesses for the purpose of contradiction.³ The law would seem to be the same in actions for seduction, and on summonses for affiliation, unless, of course, the evidence would directly tend to show that the defendant was not in point of fact the father of the child.⁴

§ 1442. Such, then, being the state of the authorities, it is not easy to say with precision what rule would apply to a new combination of facts. A sensible lawyer, really anxious to promote the interests of truth and justice, would probably, on most occasions feel inclined to follow the former, rather than the latter, class of cases. For, while no doubt it is of great importance to confine the attention of the jury as much as possible to the specific issues, it is highly essential to the discovery of truth, that those, who are to determine the respective value of conflicting testimony, should be enabled to discriminate between the interested and disinterested witnesses; and no test of interest

¹ *Harrison v. Gordon*, 1838, 2 Lew. C. C. 156.

² *R. v. Yewin*, 1811, 2 Camp. 639 (Lawrence, J.).

³ *R. v. Holmes and Furness*, 1871, L. R. 1 C. C. R. 334; affirming *R. v. Hodgson*, 1812, R. & B. 211, and overruling *R. v. Robins*, 1843, 2 M. & Rob. 512. Secus, as to previous intercourse with prisoner himself, *supra*, § 1440. See, also, *R. v. Cockcroft*, 1870, 11 Cox, C. C. 410; *ante*, § 363. A defendant may, however, give general evidence of the woman's character for want of chastity, or

that she is a common prostitute: *R. v. Riley*, 1887, 18 Q. B. D. 481.

⁴ *Garbutt v. Simpson*, 1863, 32 L. J. M. C. 186. In *Verry v. Watkins*, 1836, 7 C. & P. 308, Alderson, B., in an action of seduction, allowed witnesses, irrespective of the question of paternity, to give evidence of their having had connection with the plaintiff's daughter. *Sed qu.*, since the last decisions. See, also, on this subject, and attempt to reconcile, *Andrews v. Askey*, 1837, 8 C. & P. 7; and *Dodd v. Norris*, 1814, 3 Camp. 520.

can be more sure than that which is afforded by the conduct of the witness himself. The argument that a witness cannot come prepared to defend himself against particular charges without notice, may be a very good reason why evidence that he has been guilty of a specific crime, *unconnected with the cause or parties*, should not be adduced;—and, moreover, such a fact, even if proved, would raise, in the absence of interest, only a very faint presumption that he had been guilty of perjury. But the argument should not be allowed to extend to a case, where the charge, if true, would show that the witness either had a motive to swear falsely, or was not very scrupulous in the selection of means to attain his end. A charge, too, of this nature would, almost of necessity, apply to some act of recent date, and as such might be easily explained or rebutted by the witness, if it were made without foundation. Moreover, this inquiry would seem to be all the more necessary, now that witnesses are no longer incompetent to testify on the ground of interest or crime. Indeed, this view is confirmed by a case where the judges intimated an opinion, that a witness might be asked any *questions* tending to *impeach his impartiality*, and that his answers might be contradicted by other witnesses.¹

§ 1443. Assuming, however, that a witness may in all cases be cross-examined, and, if necessary, contradicted, for the purpose of showing that his mind is not in a state of impartiality as between the two contending parties, it must, nevertheless, clearly appear, before the contradictory evidence can be admitted, that the questions answered had a direct tendency to prove that the witness was under the influence of an undue bias. The case just referred to¹ established this doctrine. In that case, on the trial of an information under the revenue laws, a witness, who had given material evidence for the Crown, was asked, on cross-examination, whether he had not *said* that the officers of the Crown had *offered* him 20*l.* to give that evidence. He denied that he had ever said so, and evidence to contradict him was held to be inadmissible; since, as the mere offer of a bribe, if unaccepted, could not in fairness prejudice the character of the

¹ Att.-Gen. *v.* Hitchcock, 1847, 16 L. J. Ex. 259, which deserves attentive perusal.

§§ 1443— party to whom it was made, it was obviously immaterial what
 1445. the witness might have *said* upon the subject. Had he been asked whether he had said that he had *received* a bribe, and denied that he had ever made such a statement, the decision might have been different.

§ 1444. Since the case last cited, the rule of law supposed to have been laid down by it has been elaborately discussed in the Irish Court of Criminal Appeal.¹ On the trial of a prisoner for rape, a witness called on his behalf professed his inability to speak English, and was accordingly sworn in Irish, and enjoyed the advantage,—to a dishonest witness no slight one,—of giving his evidence through an interpreter;² but being in cross-examination pressed as to his knowledge of the English language, and pointedly asked whether he had not very recently spoken English to two persons who were present in court, denied that he had done so. The evidence of these two persons to contradict him on this latter point was held by seven judges not to be admissible, while three were of opinion that it was admissible.³ The arguments of the minority appear, however, entitled to grave consideration, and might possibly be upheld should the same point arise in England.

§ 1445. It is in any case certainly relevant to put to a witness any question which, if answered in the affirmative, would qualify or contradict some previous part of his testimony given on the trial of the issue; and if such question be put, and be answered in the negative, the opposite party may then contradict the witness, and for this simple reason, that the contradiction would qualify or contradict the previous part of the witness's testimony, and so neutralise its effect.⁴ Accordingly a witness may be cross-examined as to a *former statement* made by him *relative to the subject-matter of the cause*, and inconsistent with his present testimony; and if he either denies, or does not distinctly admit, that he has made such statement, proof may be given that he did in fact make it. As before pointed out,⁵ the judge has now in

¹ R. v. Burke, 1858, 8 Cox, C. C. 44 (Ir.).

² See ante, § 56.

³ The three dissenting judges were O'Brien, J., Pigot, C.B., and that

profound lawyer, Pennefather, B.

⁴ Att.-Gen. v. Hitchcock, 1847, 16 L. J. Ex. 259.

⁵ By R. S. C. Ord. XXXVI. r. 38. set out in full, ante, § 1427.

§ 1445.

civil cases an absolute discretion to disallow any questions put in cross-examination which he may deem improper. However, in the exercise of this discretion he is, both in civil and criminal cases,¹ bound by the provision which requires that before proof of such statement can be given,² the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he had made such statement.³ A witness may also be asked in cross-examination if he has not said that, though on a former occasion he testified for one party, he thought that he should, if called as a witness again, testify for the other, and if he profess not to recollect or deny such statement proof of it may be given.⁴ On the principle just pointed out, if a case be such as to render evidence of opinion admissible and material (as, for instance, it is if a witness has been examined as to his *belief* respecting the identity, or the handwriting, or the sanity, of any person, or if he be a skilled witness called to state his opinion on a matter of science), he may on cross-examination be asked whether he has not on some particular occasion expressed a different opinion upon the same subject; and if he deny the fact, it may be proved by other evidence. But⁵ the previous *opinion*, as to the *merits of the cause*, of a witness who has simply testified to a fact cannot be

¹ For by 28 & 29 V. c. 18, § 1, such provision is extended to "all courts of judicature, as well criminal as all others, and to all persons having by law or by consent of parties authority to hear, receive, and examine evidence," whether in England or Ireland.

² This rule prevails in equity: *Hemming v. Maddick*, 1872, L.R. 7 Ch. 395.

³ See *Angus v. Smith*, 1829, M. & M. 473; *Crowley v. Page*, 1837, 7 C. & P. 789 (Ir.); *Andrews v. Askey*, 1837, 8 C. & P. 7; *Magrath v. Browne*, 1841, Arm. M. & O. 133 (Ir.); *The Queen's case*, 1820, 2 B. & B. 287 (H. L.). The provision referred to in the text was originally contained in "The Common Law Procedure Act, 1854" (17 & 18 V. c. 125, § 23), but this is repealed, and the terms of the existing enactment (which are substantially identical with those of the repealed § 23 of

"The Common Law Procedure Act, 1854") are as follow:—"If a witness, upon cross-examination as to a former statement made by him relative to the subject-matter of the indictment or proceeding, and inconsistent with his present testimony, does not distinctly admit that he has made such statement, proof may be given that he did in fact make it; but before such proof can be given the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such statement." The enactment in effect overrules *Pain v. Beeston*, 1830, 1 M. & Rob. 20; and *Long v. Hitchcock*, 1840, 9 C. & P. 619. See *R. v. Whelan*, 1881, 8 L. R. Ir. 314.

⁴ *Chapman v. Coffin*, 1860, 14 Gray, 454 (Am.).

⁵ Gr. Ev. § 449, almost verbatim.

§§ 1445—1447. regarded as relevant to the issue;¹ so that, for instance, in an action upon a marine policy, the denial of a broker called on behalf of the defendant to prove a particular fact, that he had expressed an opinion that the defendant had not a leg to stand on, is conclusive, and evidence to contradict him as to this must be rejected.²

§ 1446. If, however, a witness has made a previous statement *in writing* as to the facts of a case, he has been, since 1854,³ and is now, under a provision in the Act of Parliament⁴ extending to all courts,⁵ liable to be cross-examined upon such statement without its previous production.⁶

§ 1447.⁷ If it appear either from the cross-examination of the witness, or from any antecedent evidence, that the writing in question has been *lost* or *destroyed*, the provision that the judge may require its production of course becomes inoperative. It is apprehended that in such a case the witness might be cross-examined as to the contents of the paper, notwithstanding its non-production; and that, if it were material to the issue, he might be afterwards contradicted by secondary evidence. The

¹ *Daniels v. Conrad*, 1833, 4 Leigh, R. 401 (Am.).

² *Elton v. Larkins*, 1832, 1 M. & Rob. 196.

³ Under §§ 24 and 103 of "The Common Law Procedure Act, 1854" (17 & 18 V. c. 125), which are now repealed, and in Ireland under §§ 27 and 98 of "The Common Law Procedure Amendment Act (Ireland), 1856" (19 & 20 V. c. 102). The law is the same in India: see "Ind. Evid. Act of 1855," § 34. The common law rule was that the cross-examining party was obliged, when it was in writing, to show his contradictory statement to the witness, and afterwards put it in as his own evidence: see *The Queen's case*, 1820, 2 B. & B. 287, and *Macdonnell v. Evans*, 1852, 21 L. J. C. P. 141. This rule excluded one of the best tests by which a witness's memory and integrity could be tried: see article by Ld. Brougham in *Ed. Rev.* Vol. 69, p. 22, and his speech on Law Reform, Vol. 2, Ld. Brougham's *Speeches*, p. 447. See, also, the general reasons for changing the law, ably stated in Second Report of Common Law Commissioners, at pp. 19—21. See, also, 1st edit. of

this Work, § 1057.

⁴ Under "The Law of Evidence and Practice on Criminal Trials Amendment Act, 1865" (28 & 29 V. c. 18, §§ 1, 5).

⁵ *Id.* § 1.

⁶ The words of this enactment (28 & 29 V. c. 18, § 5), are as follow:—"A witness may be cross-examined as to previous statements made by him in writing, or reduced into writing, relative to the subject-matter of the indictment, or proceeding, without such writing being shown to him; but if it is intended to contradict such witness by the writing, his attention must, before such contradictory proof can be given, be called to those parts of the writing which are to be used for the purpose of so contradicting him: Provided always, that it shall be competent for the judge, at any time during the trial, to require the production of the writing for his inspection, and he may thereupon make such use of it for the purposes of the trial as he may think fit."

⁷ *Gr. Ev.* § 464, slightly, as to first eight lines.

question, however, remains whether in such a case the cross-examining party may *interpose evidence out of his turn*, to prove the loss or destruction of the document, or to show that it is in the hands of the opponent, who has had notice to produce it, and has refused to do so; and then cross-examine the witness as to its contents.¹ Such a course was in former times deemed irregular,² but modern authorities tend to show that it may now be allowed. Thus, if the paper in question be not in the actual possession of the cross-examining party, he may, before commencing his cross-examination, or during its progress, direct any person, whom he has served with a subpoena duces tecum, to produce the writing,³ or may call upon the adversary to do so, if such paper be in his hands, and he has had notice to produce it.⁴ A prisoner's counsel has also been allowed to interpose proof of the loss of the original depositions, and of the correctness of a copy, and then to cross-examine the witness, the copy being first duly read;⁵ and a witness has also been permitted to be cross-examined upon an office copy of an affidavit by her, (such affidavit itself being filed,) on the cross-examining counsel putting in an order to admit such office copy to be a true copy.⁶ If,⁷ in any particular case the above course of proceeding would be likely to occasion inconvenience, by disturbing the regular progress of the cause and distracting the attention of the jury, the judge would have power to postpone the examination as to this point to a later stage in the trial.⁸

§ 1448. It is perhaps doubtful whether the provision⁹ enabling the judge to call for the production of a document upon which it is proposed to cross-examine a witness "for his inspection," renders it necessary that the *original* should be forthcoming, or whether an office¹⁰ or examined copy will suffice. For it is reported to have been held at *Nisi Prius*,¹¹ that a plaintiff's

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1448.

¹ See 1 St. Ev. 205, n. d.

² *Graham v. Dyster*, 1816, 2 Stark. R. 23; *Sideways v. Dyson*, 1817, 2 Stark. R. 49.

³ *Att.-Gen. v. Bond*, 1839, 9 C. & P. 189.

⁴ *Calvert v. Flower*, 1836, 7 C. & P. 386.

⁵ *R. v. Shellard*, 1840, 9 C. & P. 279.

⁶ *Davies v. Davies*, 1840, 9 C. & P.

252. No order in such a case would now be necessary. See R. S. C. 1883, Ord. XXXVII. r. 4, cited post, § 1538; also, Ord. XXXVIII. r. 15.

⁷ Gr. Ev. § 464, in part.

⁸ 2 Ph. Ev. 512; *McDonnell v. Evans*, 1852, 21 L. J. C. P. 141.

⁹ Set out supra, § 1446.

¹⁰ See n. 6, supra.

¹¹ *Bastard v. Smith*, 1839, 10 A. & E. 213.

**§§ 1448,
1449-50.**

counsel had no right, under the old law, to cross-examine one of the defendant's witnesses on the contents of his own affidavit, without putting the *original* into his hands to refresh his memory. But the grounds for the decision cited are not stated in the report; and the case is certainly both opposed to a variety of decisions,¹ and, moreover, contravenes the rule which protects from removal the records of courts of justice. When an office or examined copy is used, some difficulty may indeed sometimes arise in identifying the witness with the person who swore to the truth of the original document, and to obviate this inconvenience, it may occasionally be prudent to produce the record itself;² but this is very different from holding that the record *must* be produced.

§ 1449-50. The enactment under discussion being applicable to courts of criminal jurisdiction,³ as well as to civil courts, the rules laid down by the judges in 1836, as to the *mode of cross-examining witnesses* for the Crown, *with respect to what they have previously sworn before the magistrate*, would appear to be no longer in force,⁴ and since the passing of that Act, the settled

¹ Ewer v. Ambrose, 1825, 4 B. & C. 24; Highfield v. Peake, 1827, M. & M. 109; Davies v. Davies, 1840, 9 C. & P. 252; Sainthill v. Bound, 1802, 4 Esp. 74; Garvin v. Carroll, 1847, 10 Ir. L. R. 330.

² See Garvin v. Carroll, 1847, 10 Ir. L. R. 330 (Crampton, J., commenting on Rees v. Bowen, 1825), M. Cl. & Y. 383.

³ 28 & 29 Vict. c. 18, § 1, 5.

⁴ These rules were as follows:—

“1. Where a witness for the Crown has made a deposition before a magistrate, he cannot, upon his cross-examination by the prisoner's counsel, be asked whether he did or did not, in his deposition, make such or such a statement, until the deposition itself has been read, in order to manifest whether such statement is or is not contained therein; and such deposition must be read as part of the evidence of the cross-examining counsel.

“2. After such deposition has been read, the prisoner's counsel may proceed in his cross-examination of the witness as to any supposed contradiction or variance between the testi-

mony of the witness in court and his former deposition; after which the counsel for the prosecution may re-examine the witness, and after the prisoner's counsel has addressed the jury, will be entitled to the reply. And in case the counsel for the prisoner comments upon any supposed variance or contradiction, without having read the deposition, the court may direct it to be read, and the counsel for the prosecution will be entitled to reply upon it.

“3. The witness cannot, in cross-examination, be compelled to answer, whether he did or did not make such a statement before the magistrate, until after his deposition has been read, and it appears that it contains no mention of such statement. In that event the counsel for the prisoner may proceed with his cross-examination (R. v. Curtis, 1848, 2 C. & K. 763); and if the witness admits such statement to have been made, he may comment upon such admission, or upon the effect of it upon the other part of his testimony; or if the witness denies that he made such

practice in criminal courts has been as follows:—A witness may be cross-examined as to what he said before the magistrate, the counsel cross-examining may show the witness the deposition and ask him whether he still adheres to the statement he has made in court, without the counsel reading the deposition in court or putting it in evidence, but the counsel is then bound by the answer of the witness unless the deposition is put in to contradict him, and it is not admissible to state that the deposition does contradict him unless it is so put in.¹

§§ 1450,
1451.

§ 1451. The rule requiring the attention of a witness to be specially drawn to the circumstances, about which it is proposed to impeach his credit by independent evidence, is not confined to cases where a witness is alleged to have made contradictory statements, but extends to all cases where proof of declarations made or acts done by a witness is tendered, with a view either of contradicting his testimony in chief, or of proving that he is a corrupt witness, or that he has been guilty of attempting to corrupt others.² "I like the broad rule," said Patteson, J., "that when

statement, the counsel for the prisoner may then, if such statement be material to the matter in issue, call witnesses to prove that he made such statement. But in either event, the reading of the deposition is the prisoner's evidence, and the counsel for the prosecution will be entitled to reply."

Under these rules, a witness for the prosecution could not be directed by the prisoner's counsel to look at his deposition and then say whether he still adheres to the statement he had just made, but the deposition had first to be read as evidence for the prisoner, and the witness afterwards cross-examined respecting its contents (*R. v. Ford*, 1851, 2 Den. C. C. 245; *R. v. Palmer*, 1851, 5 Cox, C. C. 236; *R. v. Stokes*, 1850, 4 Cox, C. C. 451; *R. v. Brewer*, 1863, 9 Cox, C. C. 409). The application of the rules was always, however, confined to cases in which the depositions had been duly taken and returned, and would, consequently, furnish the best evidence of what took place at the prior examination (*R. v. Griffiths*, 1841, 9 C. & P. 746 (Coleridge, J., and Gurney, B.)). Neither had they

the effect of protecting a witness from cross-examination as to what he said in the presence of the prisoner prior to his giving his testimony before the magistrate, although his words had been officiously taken down by the magistrate's clerk, and afterwards verified on oath by himself when examined by the justice, so that they actually appear in the deposition as formally returned (*R. v. Christopher*, 1850, 2 C. & K. 994). Such rules, too, being merely intended to check the licence of the bar, did not bind the judges themselves, or deprive them of their discretionary power of questioning the witness as to any discrepancy between his evidence in court and his former statement, without first putting in the depositions; but it was questionable whether in such a case, if new facts were introduced in evidence, the counsel for the prosecution was not entitled to reply (*R. v. Edwards*, 1837, 8 C. & P. 26; *R. v. Peel*, 1860, 2 F. & F. 21 (Willes, J.)).

¹ *R. v. Riley*, 1866, 4 F. & F. 964; *R. v. Wright*, 1866, 4 F. & F. 967.

² The Queen's case, 1820, 2 B. & B. 287, H. L.

§§ 1451— you mean to give evidence of a witness's declarations *for any*
 1453. *purpose*, you should ask him whether he ever used such expressions."¹

§ 1452. The decisions on the question, whether or not a party is entitled to see a document, which has been shown to one of his witnesses while under cross-examination by his opponent, are somewhat conflicting. On the whole, however, the practice seems to be, that if the cross-examining counsel, after putting a paper into the hands of a witness, merely asks him some question as to its general nature or identity,² his adversary will have no right to see the document; but that if the paper be used for the purpose of refreshing the memory of the witness,³ or if any questions be put respecting its contents,⁴ or as to the handwriting in which it is written,⁵ a sight of it may then be demanded by the opposite counsel. But such opposing counsel has no right to read such a document through, or to comment upon its contents, till so used or put in by the cross-examining counsel. If it be not put in, its absence may be remarked upon by the counsel on the other side.⁶ The counsel on the other side will, moreover, have a right (even where it is not put in) to ask questions upon it in re-examination, without himself putting it in.⁷

§ 1453. It has already been observed, that there are some questions which a witness is *not compellable to answer*. First, this is the case where the answers would have a *tendency* to expose the witness,⁸ or, as it seems, the husband or wife of the witness,⁹

¹ *Carpenter v. Wall*, 1840, 3 P. & D. 457. In this case the court (though it did not decide the point) apparently thought that in an action for seduction proof of light and unbecoming language by the woman seduced might be admissible in reduction of damages, even if such expressions had not been previously put to her in cross-examination. It is, however, submitted that, even in such cases, the defence must, under such circumstances, be restricted to general evidence of her lightness of conduct.

² *Collier v. Nokes*, 1849, 2 C. & K. 1012; *Cope v. Thames Haven*

Dock Co., 1848, 18 L. J. Ex. 345; *Sinclair v. Stevenson*, 1824, 1 C. & P. 585; *Russell v. Rider*, 1834, 6 C. & P. 416.

³ *Ante*, § 1413.

⁴ *Cope v. Thames Haven Dock Co.*, 1848, 18 L. J. Ex. 345.

⁵ *Peck v. Peck*, 1870, 21 L. T. 670.

⁶ *Id.*

⁷ *R. v. Ramsden*, 1827, 2 C. & P. 604.

⁸ *R. v. Garbett*, 1847, 1 Den. C. C. 236.

⁹ *Cartwright v. Green*, 1800, 8 Ves. 405; *R. v. All Saints, Worcester*, 1817, 6 M. & Solw. 194; *ante*, § 1369.

§ 1453.

to any kind of *criminal charge*, whether in the common law or ecclesiastical¹ courts, or to a *penalty* or *forfeiture*² of any nature whatsoever.³ This rule is of great antiquity, and was even acted upon by Chief Justice Jefferies when it told *against* the prisoner.⁴ It applies equally to parties and to witnesses, and it is now uniformly recognised by all British tribunals, whether civil or criminal. Thus no *party* can be compelled to *discover* that, which, if answered, would tend to subject him to any punishment,⁵ penalty,⁶ forfeiture,⁷ or ecclesiastical censure,⁸ however material the answer may be to his adversary's case.⁹ Accordingly, as late as 1781, we find witnesses protected from answering the question whether they were protestants or papists.¹⁰ On like grounds, too, a witness will not be forced to answer questions or interrogatories of a criminating tendency;¹¹ although, if any such interrogatories be administered, they will not on that account be struck out by

¹ *Parkhurst v. Lowten*, 1816, 1 Mer. 401, as to simony; *Brownsword v. Edwards*, 1751, 2 Ves. sen. 245, as to incest; *Chetwynd v. Lindon*, 1752, 2 Ves. sen. 450, and *Finch v. Finch*, 1752, 2 Ves. sen. 493, as to concubinage.

² Qu. as to the meaning of this word, *Pye v. Butterfield*, 1865, 34 L. J. Q. B. 17.

³ *R. v. Freind*, 1696, 13 How. St. Tr. 16; *R. v. Ld. G. Gordon*, 1781, 21 How. St. Tr. 535; *R. v. Ld. Macclesfield*, 1725, 16 How. St. Tr. 1252, 1391; *R. v. Slaney*, 1832, 5 C. & P. 213; *R. v. Pegler*, 1833, 5 C. & P. 521; *Maloney v. Bartley*, 1812, 3 Camp. 210; *Dandridge v. Corden*, 1827, 3 C. & P. 11; *Chester v. Wortley*, 1856, 18 C. B. 239. But see *R. v. Boyes*, 1861, 30 L. J. Q. B. 302, cited post, § 1458.

⁴ *R. v. Rosewell*, 1684, 10 How. St. Tr. 190.

⁵ *Macallum v. Turton*, 1828, 2 Y. & J. 183; *Paxton v. Douglas*, 1812, 19 Ves. 225; *Thorpe v. Macaulay*, 1820, 5 Madd. 229; *Claridge v. Hoare*, 1807, 14 Ves. 59; *McIntyre v. Mancius*, 1819, 16 Johns. 592.

⁶ See cases cited in last note. Where a statute creates an offence and empowers a county court to

make an order requiring any person to abstain from committing the offence and also to impose a penalty upon any person disobeying the order, the county court may in proceedings taken to obtain an order grant discovery against the defendant, since discovery in proceedings to obtain an order could not expose the defendant to a penalty: *Derby Corporation v. Derby C. C.*, [1897] A. C. 550.

⁷ *Parkhurst v. Lowten*, 1816, 1 Mer. 401; *Ld. Uxbridge v. Stave-land*, 1747, 1 Ves. Sen. 56; *Bp. of Cork v. Porter*, 1877, Ir. R. 11 C. L. 94. As to the distinction between a forfeiture and a conditional limitation respecting which no protection is allowed, see *Hambrook v. Smith*, 1852, 17 Sim. 209.

⁸ See cases cited n.^o, supra, to this section.

⁹ *Wigr. Disc.* 80, 81, 192, 193, and cases there cited; *Story, Eq. Pl.* §§ 524, 576, 577, 592—598. See *Chadwick v. Chadwick*, 1852, 22 L. J. Ch. 329.

¹⁰ *R. v. Freind*, 1696, 13 How. St. Tr. 16; *R. v. Ld. G. Gordon*, 1781, 21 How. St. Tr. 535.

¹¹ *Paxton v. Douglas*, 1812, 19 Ves. 225; *Lamb v. Munster*, 1882, 10 Q. B. D. 110.

§§ 1453,
1454.

the court.¹ We have already seen² that witnesses in proceedings instituted in consequence of adultery, even although they be parties to the suit, are in general protected from being asked questions tending to show that they have been guilty of adultery. The same doctrine prevails in the spiritual courts,³ and it is also part and parcel of the law of Scotland.⁴

§ 1454. Some cases, however, justify a doubt, whether the protection has not been carried beyond the bounds which the necessities of the case substantially require.⁵ Thus, in an action for a libel, contained in a voluntary affidavit, sworn extra-judicially before a magistrate, the magistrate's clerk was held not bound to answer whether he wrote the affidavit by defendant's orders, and delivered it to the magistrate;⁶ and in Ireland it has been decided that, upon a trial for the murder of a person killed in a duel, any person who was present, and in any way countenanced the proceeding, may refuse to answer any question relating thereto.⁷ It is not intended to insinuate that these decisions are wrong in point of law; for numerous authorities might be cited, which clearly establish that if the fact to which the witness is interrogated forms but a *single remote link* in the chain of testimony, which *may* implicate him in a crime or misdemeanour, or

¹ *Fisher v. Owen*, 1878, 8 Ch. D. 645 (C. A.). This case overrules *Atherley v. Harvey*, 1877, 2 Q. B. D. 524; *Allhusen v. Labouchere*, 1878, 3 Q. B. D. 654; *Spokes v. Grosvenor Hotel Co.*, [1897] 2 Q. B. 124. See *Bp. of Cork v. Porter*, 1877, Ir. R. 11 C. L. 94. This rule has no application to interrogatories in actions brought to recover statutory penalties or actions for forfeitures; in these cases, however, it was not the practice before the Judicature Acts, nor is it the practice under the present Rules of Court, to allow interrogatories or discovery, see *Mexborough v. Whitwood*, [1897] 2 Q. B. 111; *Martin v. Treacher*, 1886, 16 Q. B. D. 507; *Hummings v. Williamson*, 1883, 10 Q. B. D. 459; an objection to interrogatories or discovery can therefore be raised in such cases not on oath, and no such interrogatories will be passed by the master under Ord. XXXI., r. 2.

² Ante, § 1355A.

³ *Swift v. Swift*, 1832, 4 Hagg. Ecc. 154; *King v. King*, 1850, 2 Roberts. 153.

⁴ *Alison*, Pract. of Cr. I. (Sc.) 527.

⁵ In New York the protection is far more limited than in England. See Civ. Code, § 1854, which enacts, that a witness "need not give an answer, which will have a tendency to subject him to punishment for a felony." This seems to be a sound rule.

⁶ *Maloney v. Bartley*, 1812, 3 Camp. 210.

⁷ *R. v. Handcock*, 1841, Ir. Cir. R. 229. For other instances of injustice occasioned by the stringency of this rule, see *Brownsword v. Edwards*, 1751, 2 Ves. Sen. 245; *Sharp v. Carter*, 1735, 3 P. Wms. 375; *Claridge v. Hoare*, 1807, 14 Ves. 59. See, also, some very sensible observations on this subject in the *Law Rev.*, No. xiii. pp. 19—30.

expose him to a penalty or forfeiture, he is not bound to answer.¹ But it may be suggested that it would be a better rule if, *where the question is material to the issue*, it were left to the discretion of the judge, whether or not he will enforce an answer, having due regard to the general interests of justice.

§ 1455. The Legislature has, however, often recognised and acted on the principle that answers which have been forced from a witness shall not afterwards be evidence against such witness.²

¹ *Cates v. Hardacre*, 1811, 3 Taunt. 424; *Macallum v. Turton*, 1828, 2 Y. & J. 183; *Parkhurst v. Lowten*, 1816, 1 Mer. 401; *Paxton v. Douglas*, 1812, 19 Ves. 225; *Harrison v. Southcote*, 1751, 1 Atk. 528; *Swift v. Swift*, 1832, 4 Hagg. Ecc. 154; *King v. King*, 1850, 2 Roberts. 153; *M'Mahon v. Ellis*, 1859, 10 Ir. C. L. R. 120; *The People v. Mather*, 1830, 4 Wend. 229, 252 (Am.); *Southard v. Rexford*, 1826, 6 Cowen, 254 (Am.); *Bellinger v. The People*, 1832, 8 Wend. 595 (Am.).

² The following are instances of such principle being acted upon:—*Acts of indemnity* are occasionally passed (see 7 & 8 V. c. 7; and 14 & 15 V. c. 106) to absolve from punishment or penalty any witness who makes a faithful discovery of what he knows in relation to the matters under investigation. The cases in which this is done are usually where parliamentary inquiries are about to take place, or prosecution about to be instituted, for gaming, riot, conspiracy, or other offences as to which the testimony of a large number of persons who were implicated as guilty parties will probably be needed. Moreover, indemnity clauses, somewhat similar to those presently set out as contained in "The Larceny Act," will be found in "The Corrupt Practices Prevention Act, 1854 to 1883" (see as to these, 17 & 18 V. c. 102, § 35; 31 & 32 V. c. 125, § 56, continued to 31st December, 1905, by 4 Ed. 7, c. 29; and 46 & 47 V. c. 51; *R. v. Charlesworth*, 1860, 2 F. & F. 326; *R. v. Buttle*, 1870, L. R. 1 C. C. R. 248; *R. v. Slator*, 1881, 8 Q. B. D. 267; *Ex parte Fernandez*, 1861, 30 L. J. C. P. 321; *R. v. Leatham*, 1861, 3 E. & E. 658;

R. v. Hulme, 1870, L. R. 5 Q. B. 377; *R. v. Holl*, 1881, 7 Q. B. D. 575 (C. A.)); and indemnity clauses are also contained in "The Election Commissioners Act, 1852" (15 & 16 V. c. 57), § 8; "The Exhibition Medals Act, 1863" (26 & 27 V. c. 119), § 5; "The Gaming Act, 1845" (8 & 9 V. c. 109), § 9, amended by 55 V. c. 9; "The Gaming Houses Act, 1854" (17 & 18 V. c. 38), §§ 5 and 6; "The Merchandise Marks Act, 1887" (50 & 51 V. c. 28), § 19 (2); "The Poisoned Grain Prohibition Act, 1863" (26 & 27 V. c. 113), § 5; "The Record of Title (Ireland) Act, 1865" (28 & 29 V. c. 88), § 59; "The Explosive Substances Act, 1883" (46 & 47 V. c. 3), § 6 (2). "The Larceny Act, 1861" (24 & 25 V. c. 96), §§ 75–85, enacts that, nothing therein which relates to frauds committed by bankers, factors, trustees, directors, solicitors, or other agents (and, by §§ 28 & 29 of the same statute, a similar rule is to prevail with respect to persons charged with stealing, or fraudulently destroying or concealing, any title-deed or will), "shall enable or entitle any person to refuse to make a full and complete discovery by answer to any bill in equity, or to answer any question or interrogatory in any civil proceeding in any court, or upon the hearing of any matter in bankruptcy, or insolvency; and no person shall be liable to be convicted of any of the misdemeanors" in that Act mentioned relative to such frauds, "by any evidence whatever in respect of any act done by him, if he shall at any time previously to his being charged with such offence have first disclosed" (which word means the

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1455.

§ 1456.

§ 1456. The protection formerly afforded to a person by the rule that no one can be compelled to criminate himself has been taken away by statute from the "printer, publisher or proprietor" of a newspaper in which a libel appears. Every such person, whether in England or Ireland, was, in the reign of W. 4, made compellable¹ to answer a bill of discovery as to his connection with any such newspaper, which answer is not to be used in any proceeding other than that for which it is obtained. And the substance of this enactment is still in force,² the High Court now exercising all the powers formerly possessed by Courts of

discovery of that which was before unknown, and not the statement of that which was before known: *R. v. Skeen and Freeman*, 1859,) "such act on oath, in consequence of any compulsory process of any court of law or equity, in any action, suit, or proceeding, bona fide instituted by any party aggrieved, or in any compulsory examination or deposition upon the hearing of any matter in bankruptcy or insolvency" (see *R. v. Strahan*, 1855, 7 Cox, C. C. 85). The same statute, in § 86, further enacts that nothing therein shall prevent, lessen, or impeach any remedy which any person aggrieved by any such fraud may have; but no conviction of any such offender shall be received in evidence in any action against him. By "*The Bankruptcy Act*, 1890" (53 & 54 V. c. 71), § 27 (1), so much of this provision as enacts that no person shall be liable to be convicted of any of the misdemeanors mentioned in §§ 75—84 of *The Larceny Act*, if he shall have first disclosed the same in any compulsory examination or deposition before any court on the hearing of any matter in bankruptcy or insolvency, is repealed, and in its place it is enacted by s. 27, sub-s. (2) that "a statement or admission made by any person in any compulsory examination or deposition before any court on the hearing of any matter in bankruptcy shall not be admissible as evidence against that person in any proceeding in respect of any of the misdemeanors referred to in the said section eighty-five" (of the *Larceny Act*, 1861).

¹ By 6 & 7 W. 4, c. 76.

² The history of the legislation on the subject is very intricate. The original enactment was contained in a Stamp Act, viz., 6 & 7 W. 4, c. 76, § 19. By 32 & 33 V. c. 24, § 1, and Sched. 1, this Act was repealed; but by the same section, those provisions of it (among which was a copy of § 19) which were contained in Sched. 2 of such Act, were re-enacted. By 33 & 34 V. c. 99 ("An Act for the repeal of certain enactments relating to the Inland Revenue"), the original Stamp Act of 6 & 7 W. 4, c. 76, was again repealed, but 32 & 33 V. c. 24, was not noticed, and is consequently unaffected. The provisions of 32 & 33 V. c. 24 (copied, it is true, from 6 & 7 W. 4, c. 76), which are thus left in force, are treated in the Revised Edition of the Statutes as if they had been repealed. Now the enactment 6 & 7 W. 4, c. 76, § 19, certainly is (as first cited) repealed. But similar provisions will be found in Sched. 2, to 32 & 33 V. c. 24, and this latter enactment cannot be found to have been ever in fact repealed. Such provisions were accordingly acted upon in *Carter v. Leeds Daily News* (W. N. for 1876, at p. 11), where a useful form of interrogatories will be found, though the words "editor or," and "what position does he occupy in respect of the said newspaper," as also the whole of pars. 4 and 5, were struck out by the judge; and recent decisions make Nos. 3 and 6 of them improper. See, also, *Fisher and Strahan's Law of the Press*, pp. 152, 153.

Equity,¹ and an order for an answer to interrogatories² would appear to correspond to a decree upon a bill of discovery under the old practice.

§§ 1456,
1457.

§ 1457. Whether the answer may tend to criminate the witness, or expose him to a penalty or forfeiture, will, as soon as the protection is claimed, be determined by the light of all the circumstances, without, however, requiring the witness to fully explain how the effect would be produced, since this would annihilate the protection which the rule is designed to afford.³ A declaration on *oath* by a witness that he *believes* that the answer will tend to criminate him, will, if it appear to the presiding judge that it is, under all the circumstances, likely to be well founded,⁴ protect him from answering either when in the witness box or in reply to written interrogatories.⁵ The objection, however, must be taken by way of answer, and not by way of objection to the question.⁶ But the person interrogated must, whether he be in the witness box or called on to answer interrogatories, actually pledge his oath to such a belief.⁷ Accordingly when in an action against Cardinal Wiseman for alleged libel, to which he had pleaded not guilty, plaintiff having failed to prove the publication, as a last resource proposed to examine the defendant himself, and the Cardinal, having through his counsel declined to be sworn, the learned judge ruled that he need not be sworn, a new trial was granted;⁸ and when, in an action of trover⁹ against a dock company for certain pipes of port wine,

¹ See "The Judicature Act, 1873" (36 & 37 V. c. 66), § 3.

² Under R. S. C. 1883, Ord. XXXI. r. 1.

³ *The People v. Mather*, 1830, 4 Wend. 229, 252 (Am.).

⁴ *Ex parte Reynolds, Re Reynolds*, 1882, 20 Ch. D. 294 (C. A.); following, with approval, *R. v. Boyes*, 1861, 30 L. J. Q. B. 302; *Osborn v. London Dock Co.*, 1855, 24 L. J. Ex. 140; *Sidebottom v. Adkins*, 1858, 27 L. J. Ch. 152; *Ex parte Fernandez*, 1861, 30 L. J. C. P. 321. See *The Mary or Alexandra*, 1868, L. R. 2 A. & E. 319.

⁵ *Webb v. East*, 1880, 5 Ex. D. 23 (C. A.); *Lamb v. Munster*, 1882, 10 Q. B. D. 110. As to former opinions upon this subject, see *R.*

v. Garbett, 1847, 1 Denn. C. C. 236; *Fisher v. Ronalds*, 1852, 22 L. J. C. P. 62; *Adams v. Lloyd*, 1858, 27 L. J. Ex. 499; and *In re Mexican & S. Amer. Co., Ex parte Aston*, 1859, 28 L. J. Ch. 634 (C. A.).

⁶ *Fisher v. Owen*, 1878, 8 Ch. D. 645 (C. A.); *Sammons v. Bailey*, 1890, 24 Q. B. D. 727.

⁷ *Webb v. East*, 1880, 5 Ex. D. 23 (C. A.).

⁸ *Boyle v. Wiseman*, 1855, 24 L. J. Ex. 284. On the new trial then granted, 1,000*l.* damages were awarded.

⁹ *Osborn v. The London Dock Co.*, 1855, 24 L. J. Ex. 140. But see *Tupling v. Ward*, 1861, 30 L. J. Ex. 222.

§§ 1457,
1458.

the defendants alleged that the wine deposited with them was "sour wine," the produce of "rummage sales," and that the wine claimed was "sound port," their theory being that the sour wine had been by some means fraudulently and dishonestly abstracted, and the empty pipes refilled by tapping other stores in the dock, interrogatories to establish this case were allowed (and they would also be admissible under the present practice) since plaintiff's oath might show either that the answer to them would tend to criminate him, or else entirely negative the defence set up, but in either view defendants were entitled to have plaintiff's oath. An actual oath to the facts being required, a person will not be protected by merely "*submitting*" in his affidavit in answer to interrogatories,¹ "that he is not bound to discover" certain matters, because the discovery would expose him to penalties.² The rule appears to apply to the discovery of criminatory documents, equally to the discovery of facts, and the objection must similarly be taken on oath in the affidavit of discovery.³

§ 1458. In all cases where an objection to answer is taken on the ground that the answer may tend to criminate the deponent, the court, as has just been stated, requires to see, from the surrounding circumstances, and from the nature of the evidence sought to be obtained from the witness, that reasonable ground exists for apprehending danger to him from being compelled to answer.⁴ When, however, the fact of such danger is once made to appear, considerable latitude should be allowed to the witness in judging for himself of the effect of any particular question; for it is obvious that a question, though at first sight apparently innocent, may by affording a link in a chain of evidence, become the means of bringing home an offence to the party answering.⁵ Yet, as Lord Hardwicke once observed, "these objections to answering should be held to very strict rules;"⁶ and the court

¹ See R. S. C. 1833, Ord. XXXI. r. 6, cited ante, § 527.

² Scott v. Miller, 1859, 1 Johns. 328 (Am.).

³ Spokes v. Grosvenor Hotel Co., [1897] 2 Q. B. 124.

⁴ In re Genese, Ex parte Gilbert, 1885, 3 Morrell, 223 (C. A.); R. v.

Boyes, 1861, 30 L. J. Q. B. 302. See Bunn v. Bunn, 1864, 4 De G. J. & S. 316.

⁵ R. v. Boyes, 1861, 30 L. J. Q. B. 302.

⁶ Vaillant v. Dodemead, 1742, 2 Atk. 524; cited (Id. Eldon) in Parkhurst v. Lowten, 1818, 1 Mer. 401.

ought at least to have the sanction of an oath as the foundation of the objection. Where, however, the probability of an answer having a tendency to criminate is apparent to the judge, the actual form of words used by the witness in taking the objection is not material so long as it shows that the witness's objection to answer is based on the apprehension that his answer may tend to expose him to a criminal charge.¹

§§ 1458,
1458a.

§ 1458A. If any prosecution or penalty or forfeiture, which the witness fears, be barred by lapse of time;² or if the offence has been pardoned,³ or the penalty or forfeiture waived; or if, in any other way, the reason for the privilege has ceased, the privilege itself will cease also, and the witness will be bound to answer.⁴ A witness, too, who has received a pardon under the great seal, has thereby lost his privilege of protection against criminating himself, even though he, under these circumstances, is still (by the Act of Settlement),⁵ exposed to the remote contingency of an impeachment by the House of Commons.⁶ It appears doubtful whether a witness can object to answer a question on the ground that he is a foreigner, and that his answer will render him liable to be prosecuted in his own country, and contradictory decisions on the point have been given.⁷ This protection, too, has not been imported, at least in all its strictness, into the *bankruptcy law*;⁸ for although a mere witness⁹ is certainly not bound to

¹ *Lamb v. Munster*, 1882, 10 Q. B. D. 110 (Field and Stephen, JJ.).

² *Roberts v. Allatt*, 1828, M. & M. 192; *Parkhurst v. Lowten*, 1819, 1 Mer. 401; *The People v. Mather*, 1830, 4 Wend. 229, 252 (Am.); *Williams v. Farrington*, 1789, 2 Cox, (Ch.) 202; *Davis v. Reid*, 1832, 5 Sim. 443.

³ *R. v. Boyes*, 1860, 2 F. & F. 158. This decision overrules two old cases, viz., *R. v. Reading*, 1679, 7 How. St. Tr. 796; and *R. v. Shaftesbury*, 1681, 8 How. St. Tr. 817.

⁴ *R. v. Charlesworth*, 1860, 2 F. & F. 326; *Wigr. Disc.* 83, 84, and cases there cited.

⁵ 12 & 13 W. 3, c. 2, § 3.

⁶ *R. v. Boyes*, 1861, 30 L. J. Q. B. 302.

⁷ In *King of the Two Sicilies v. Wilcox*, 1851, 1 Sim. N. S. 301, *Ld. Cranworth* held that an

order for production could be made, but *Ld. Chelmsford*, C. in *U. S. v. M'Rae*, 1867, L. R. 3 Ch. 79, held, that a plea of penalties to which the defendant's answer may expose him in a foreign country, is a good plea to discovery, if the law of the foreign country clearly appears.

⁸ See *In re Genese*, Ex parte Gilbert, 1885, 3 Morrell, 223 (C. A.). See as to the old law, *R. v. Scott*, 1856, 25 L. J. M. C. 128, recognised by *Ld. Campbell* in *Goode v. Job*, 1851, 28 L. J. Q. B. 1; *R. v. Cross*, 1856, *Dears. & Bell*. 68; *R. v. Robinson*, 1867, L. R. 1 C. C. R. 80; 12 & 13 V. c. 106, §§ 117, 260; 20 & 21 V. c. 60, §§ 306, 385, Ir.; 24 & 25 V. c. 134, §§ 102, 189.

⁹ Summoned under § 27 of "The Bankruptcy Act, 1883" (46 & 47 V. c. 52).

§§ 1458a,
1459.

answer criminative questions,¹ the debtor himself may, as it seems, be compelled to do so,² and the answers thus elicited will be admissible against him in any subsequent criminal prosecution.³ But it is provided⁴ that "a statement or admission made by any person in any compulsory examination or deposition, before any court on the hearing of any matter in bankruptcy, shall not be admissible as evidence against that person in respect of any of the misdemeanors" referred to in certain sections of the Larceny Act,⁵ relating to frauds by "agents, bankers, or factors."⁶ A statement of affairs prepared by a debtor in the course of his bankruptcy under the Bankruptcy Act, 1883,⁵ although compulsory, has been held not to be "a statement or admission made by any person in any compulsory examination or deposition, before any court on the hearing of any matter in bankruptcy," and therefore to be admissible in evidence against him in subsequent criminal proceedings.⁶

§ 1459. The law, after much debate, is still somewhat unsettled as to whether a witness is bound to answer any question, the direct and immediate effect of answering which might be *to degrade his character*. It, however, seems clear that where the transaction, as to which the witness is interrogated, forms *any material part of the issue* he will be obliged to give evidence, however strongly it may reflect on his own conduct.⁷ Indeed, it would be alike unjust and impolitic to protect a witness from answering a question, merely because it would have the effect of

¹ *Ex parte Schofield*, *In re Firth*, 1877, 6 Ch. D. 230 (C. A.).

² 46 & 47 V. c. 52, § 17,—after empowering the court to examine upon oath the debtor as to his conduct, dealings, and property,—goes on to provide in sub-sect. 8, that the debtor must "answer all such questions as the court may put or allow to be put to him. Such notes of the examination as the court thinks proper shall be taken down in writing, and shall be read over to and signed by the debtor, and may thereafter be used in evidence against him; they shall also be open to the inspection of any creditor at all reasonable times." Under § 24, the debtor must also, at the first meeting

of creditors, submit, among other things, to "such examination in respect of his property or his creditors," "as may be reasonably required by the official receiver, special manager, or trustee, or may be prescribed by general rules, or be directed by the court by any special order."

³ *R. v. Hillam*, 1872, 12 Cox, C. C. 174; *R. v. Cherry*, 1871, 12 Cox, C. C. 32.

⁴ "The Bankruptcy Act, 1890" (53 & 54 V. c. 71), § 27, sub-sect. 2, repealing § 85 of Act referred to in next note.

⁵ 24 & 25 V. c. 96.

⁶ *R. v. Pike*, [1902] 1 K. B. 552.

⁷ See *ante*, §§ 1436, 1440.

degrading him, when his testimony is required either for the due administration of public justice, or to protect the property, the reputation, the liberty, or the life of a fellow-subject. Were such a protection to prevail, a man already convicted and punished for a crime, would, if called as a witness against an accomplice, be excused from testifying to any of the transactions in which he had participated with the accused, and thus the guilty might escape.

§§ 1459,
1460.

§ 1460. Where, however, the question is not directly material to the issue, but is only put for the purpose of testing the character, and consequent *credit*, of the witness, there is much more room for doubt. Several of the older dicta and authorities tend to show, that in such case the witness is not bound to answer;¹ but this privilege, if it still exists, is certainly much discountenanced in the practice of modern times.² No doubt cases may arise, where the judge, in the exercise of his discretion, would properly interpose to protect the witness from unnecessary and unbecoming annoyance. For instance, all inquiries into discreditable transactions of a remote date, might, in general, be rightly suppressed; for the interests of justice can seldom require that the errors of a man's life, long since repented of, and forgiven by the community, should be recalled to remembrance at the pleasure of any future litigant. So, questions respecting alleged improprieties of conduct, which furnish no real ground for assuming that a witness who could be guilty of them would not be a man of veracity, might very fairly be checked.

¹ *R. v. Cook*, 1696, 13 How. St. Tr. 348; *R. v. Freind*, 1696, 13 How. St. Tr. 16; *R. v. Layer*, 1722, 16 How. St. Tr. 214; *R. v. O'Coigly*, 1798, 26 How. St. Tr. 1351; *Macbride v. Macbride*, 1803, 4 Esp. 242; *Dodd v. Norris*, 1814, 3 Camp. 520; *R. v. Hodgson*, 1812, R. & R. 211.

² *Parkhurst v. Lowten*, 1816, 1 Mer. 401; *Cundell v. Pratt*, 1827, M. & M. 108; *Roberts v. Allatt*, 1828, M. & M. 192; *R. v. Edwards*, 1791, 4 T. R. 440. See, also, *Harris v. Tippet*, and other cases cited ante, in note to § 1436, and *R. v. Holmes*, and other cases cited ante, in note to § 1441. Even *Ld. Ellenborough*—

who is reported to have once held (*Millman v. Tucker*, 1803, Pea. Add. Cas. 222) that a witness was not bound to state whether he had not been sentenced to imprisonment, and on another occasion, that the question could not so much as be put to him (*R. v. Lewis*, 1803, 4 Esp. 226)—seems, in a later case, to have disregarded the rules previously enunciated by himself (*Frost v. Holloway*, 1818, cited St. Ev. 212, n. n.; and 2 Ph. Ev. 500); for, on a witness declining to say whether or not he had been confined for theft in gaol, he observed, "If you do not answer the question, I will send you there."

§§ 1461—
1463.

§ 1461. But no protection of this sort should be extended to cases where the inquiry relates to transactions comparatively recent, bearing directly upon the moral principles of the witness, and his present character for veracity. In such cases as these, a person ought not to be privileged from answering, notwithstanding the answer may disgrace him.¹ It has, indeed, been termed a harsh alternative to compel a witness either to commit perjury or to destroy his own reputation;² but, on the other hand, it is obviously most important, that the jury should have the means of ascertaining the character of the witness, and of thus forming something like a correct estimate of the value of his evidence. Moreover, it seems absurd to place the mere feelings of a profligate witness in competition with the substantial interests of the parties in the cause.³

§ 1462. Wherever the answer, which the witness may give, will not immediately and certainly show his infamy, but will only *indirectly tend* to disgrace him, he may certainly be compelled to reply.⁴ Questions, however, asked with a view to degrade a witness by showing his previous bankruptcy or insolvency, may be successfully objected to on the technical ground that such a fact can only in strictness be proved by the production of the record.⁵ Still, in practice, questions are very frequently permitted in cross-examination as to whether the witness has not been insolvent, or has taken the benefit of the Bankrupt Act.⁶

§ 1463.⁷ It was at one time considered doubtful whether a witness could be compelled to answer, where by so doing he would *subject himself to a civil action or pecuniary loss*, or would *charge himself with a debt*.⁸ But to remove such doubts it has been by statute⁹ declared, that “a witness cannot by law refuse to answer

¹ And this is the practice in America. See *Carroll v. State*, 1893, 40 Am. St. R. 786.

St. Ev. 193.

Id.

Macbride v. Macbride, 1805, 4 Esp. 242; *Parkhurst v. Lowten*, 1816, 1 Mer. 401; *The People v. Mather*, 1830, 4 Wend. 229, 252; *Cundell v. Pratt*, 1827, M. & M. 108.

⁶ *Macdonnell v. Evans*, 1852, 21 L. J. C. P. 141. But see *Henman*

v. Lester, 1862, 31 L. J. C. P. 370.

⁶ *Macdonnell v. Evans*, 1852, 21 L. J. C. P. 141.

⁷ Gr. Ev. § 452, in part.

⁸ In *Ld. Melville's case*, 1806, 29 How. St. Tr. 707, this question was much discussed. Being there finally submitted to the judges, eight of them, with the Chancellor and *Ld. Eldon*, were of opinion that a witness in such case was bound to answer, while four thought that he was not.

⁹ 46 G. 3, c. 37. The law in New

a question relevant to the matter in issue, the answering of which has no tendency to accuse himself, or to expose him to penalty or forfeiture of any nature whatsoever, by reason only, or on the sole ground, that the answering of such question may establish, or tend to establish, that he owes a debt, or is otherwise subject to a civil suit, either at the instance of the Crown, or of any other person or persons.”

§§ 1463—
1465-6.

§ 1464. The statute just set out does not in terms refer to the *production of documents*. Yet its spirit plainly seems strictly applicable to such a case. Accordingly a witness will not be excused from producing papers in his possession, merely because their production may subject him to a civil action, or be otherwise prejudicial to his pecuniary interests,¹ or may render him liable to punishment, or expose him to penalty or forfeiture,² unless they be of a public nature, or such as are directed by statute to be kept and produced.³ If, indeed, the documents called for be the title deeds of the witness, or, perhaps, if they be instruments in the nature of title deeds, their production will not be enforced.⁴

§§ 1465-6. In all the cases hitherto put of the witness not being compellable to answer, or to produce documents, the *privilege is his*, and *not that of the party*;⁵ and, consequently, counsel in the cause will not be permitted to make the objection.⁶ Neither will the witness be allowed to employ counsel of his own to support his claim to protection.⁷ Nor even is the judge *bound*, as it would

York is the same: Civ. Code, § 1854. In America the English Act just cited is generally considered as declaratory of the true doctrine of the common law. See *Bull v. Loveland*, 1830, 10 Pick. 9, 14 (Am.); *Baird v. Cochran*, 1818, 4 Serg. & R. 397 (Am.); *Naylor v. Semmes*, 1829, 4 Gill. & J. 273 (Am.); *Stoddart v. Manning*, 1828, 2 Har. & G. 147 (Am.); *Copp v. Upham*, 1825, 3 New Hamp. 159 (Am.).

¹ *Doe v. Date*, 1842, 3 Q. B. 609; *Doe v. Ld. Egremont*, 1841, 2 M. & Rob. 386. These cases appear to overrule *Miles v. Dawson*, 1796, 1 Esp. 405; and *Laing v. Barclay*, 1821, 1 B. & C. 398.

² *Parkhurst v. Lowten*, 1816, 1

Mer. 401; *Whitaker v. Izod*, 1809, 2 Taunt. 115; *R. v. Dixon*, 1765, 3 Burr. 687. But see *R. v. Leatham*, 1861, 3 E. & E. 658 (*Blackburn, J.*), et qu. See, also, *R. v. Leatham*, 1861, 3 E. & E. 658.

³ *Bradshaw v. Murphy*, 1836, 7 C. & P. 612.

⁴ *Doe v. Date*, 1842, 3 Q. B. 609; *Pickering v. Noyes*, 1823, 1 B. & C. 263; 1 St. Ev. 88.

⁵ *R. v. Kinglake*, 1870, 11 Cox, C. C. 499.

⁶ *Thomas v. Newton*, 1826, M. & M. 48 n.; *R. v. Adey*, 1831, 1 M. & Rob. 94. See *Marsden v. Downes*, 1834, 1 A. & E. 31; and *Doe v. Date*, 1842, 3 Q. B. 609.

⁷ *Doe v. Ld. Egremont*, 1841, 2

§ § 1465-6
—1468.

seem, to warn the witness of his right to demur to the question,¹ though, in the exercise of his discretion, he may deem it proper to do so.² A witness may, however, claim his protection after he has been sworn, and *at any stage of the inquiry*, and if he do so, he cannot be forced to answer any additional questions tending to criminate him; in short, he cannot be carried further than he chooses voluntarily to go himself.³

§ 1467. If a witness decline to answer, it has, in more than one case, been stated that no inference of the truth of the fact can be drawn from this.⁴ But the wisdom of this rule is open to question.⁵ It would be going too far to say that the guilt of the witness *must* be implied from his silence, but it would accord with justice and reason that the jury should be at full liberty to consider that circumstance, as well as every other, when deciding on the credit due to the witness.⁶ A perfectly honourable but excitable man may occasionally repudiate a question, which he regards as an insult and to then infer dishonour would be unjust.⁷ But an honest witness when asked it in the witness box will generally be eager to rescue his character from suspicion, and at once deny the imputation, rather than rely on his legal rights, and refuse to answer an offensive question.⁸

§ 1468. The cases in which on grounds of *public policy* witnesses cannot be *compelled*, or will not be *allowed*, to answer questions put to them have already been discussed.⁹ But, as a general rule,

M. & Rob. 386; Doe v. Date, 1842, 3 Q. B. 609 (Coleridge, J., citing a decision of Park, J.).

¹ Att.-Gen. v. Radloff, 1854, 23 L. J. Ex. 240.

² Paxton v. Douglas, 1809, 16 Ves. 242; Fisher v. Ronalds, 1852, 22 L. J. C. P. 62; R. v. Boyes, 1860, 2 F. & F. 158.

³ R. v. Garbett, 1847, 1 Den. C. C. 236 (decided by nine judges against six); King of the Two Sicilies v. Willcox, 1851, 1 Sim. N. S. 301 (Ld. Cranworth); overruling an idea, which at one time prevailed, that a witness who chose to reply in part might be compelled to state everything that he knew about a transaction, and was held in Dixon v. Vale, 1821, 1 C. & P. 278; East v. Chapman, 1827, 2

C. & P. 570; and Ewing v. Osbaldiston, 1834, 6 Sim. 608; and confirming Ex parte Cossens, Re Warrall, 1820, Buck, 531, 545 (Ld. Eldon). See, however, Chadwick v. Chadwick, 1852, 22 L. J. Ch. 329.

⁴ Rose v. Blakemore, 1826, Ry. & M. 383; R. v. Watson, 1817, 2 Stark. R. 139; Lloyd v. Passingham, 1809, 16 Ves. 64; Millman v. Tucker, 1803, Pea. Ad. Cas. 222.

⁵ As it is forcibly put, a rule or statute that, upon proof that the sun was shining, no inference that it was light was to be drawn, would in practice be nugatory.

⁶ See R. v. Watson, 1817, 2 Stark. R. 139 (Bailey, J.).

⁷ 2 Ph. Ev. 501.

⁸ 1 St. Ev. 197.

⁹ Ante, Part. IV., Chap. II.

a witness cannot object to answer any question, merely because it relates to *private* matters, or because it is *immaterial*, unless the answer can be withheld on some specific ground of privilege.¹

§§ 1468—
1470a.

§ 1469. In the event of the death or serious illness of a witness between his examination in chief and his cross-examination, in Ireland the majority of the judges have in a criminal case,² and in England both a late Master of the Rolls and a late V.-C. have in a civil case,³ held that the evidence previously given by him is admissible, though the degree of weight to be attached to it is of course a question of fact.

§ 1470.⁴ After a witness has been examined in chief, his *credit may be impeached*, not only by means of cross-examination, but in various other modes. First, witnesses may be called to disprove such of the facts stated by him, whether in his direct or cross-examination, as are material to the issue.⁵ Next, proof may be given, under certain restrictions before pointed out,⁶ of statements made by the witness inconsistent with his testimony at the trial. Thirdly, evidence may be adduced reflecting on his *character for veracity*.⁷

§ 1470A. But evidence of the latter class must be confined to proof of the *general* reputation of the witness, and will not be permitted as to particular facts; for every man is supposed to be capable of supporting the one, but it is not likely that he should be prepared, without notice, to answer the other.⁸ Besides, the mischief of raising collateral issues would itself be a sufficient reason for the adoption of this rule.⁹ The regular mode of examining into the character of the person in question, is to ask the witness whether he knows that person's general reputation among his neighbours, and what that reputation is. In England

¹ *Tippins v. Coates*, 1847, 6 Hare, 16.

² In *R. v. Doolin*, 1832, 1 Jebb. C. C. 123 (Ir.).

³ *Davies v. Otty*, 1865, 34 L. J. Ch. 252; *Elias v. Griffith*, 1877, 8 Ch. D. 521. But see *Dunne v. English*, 1874, L. R. 18 Eq. 524.

⁴ Gr. Ev. § 461, in part.

⁵ As to what are material, see ante, §§ 316 et seq., and §§ 1434 et seq.

⁶ Ante, §§ 1426, 1445, 1446.

⁷ See ante, §§ 349 et seq.

⁸ B. N. P. 296, 297; *R. v. Rookwood*, 1696, 13 How. St. Tr. 211 (Trevor, Att.-Gen., argu.); *R. v. Layer*, 1722, 16 How. St. Tr. 214. See *Carlos v. Brook*, 1804, 10 Ves. 49; *Penny v. Watts*, 1848-50, 2 De G. & Sm. 501.

⁹ *R. v. Rookwood*, 1696, 13 How. St. Tr. 211 (Ld. Holt).

§§ 1470a, the witness may also be asked whether, from such knowledge, he would believe the person whose veracity is impeached upon his oath.¹ The propriety of this last question is also sustained by no inconsiderable weight of authority in the United States.² But in some American courts, a witness will not be permitted to state his own opinion that another witness is not worthy of belief.³

1471.

§ 1471. Whether the inquiry into the general reputation of a witness must be restricted to his reputation for veracity, or may be made in general terms, *involving his entire moral character* and estimation in society, is not yet definitely settled. When it is considered how intimate is the connexion between one crime and another, and moreover, how difficult it may be to find a witness, who can, in strictness, testify as to the bad character for veracity even of one who having, in the language of Sir Charles Wetherell,⁴ been notoriously "guilty of crimes under every letter of the alphabet," is consequently undeserving of the slightest credit, it certainly appears reasonable that the question as to reputation should be put in the most general form, the opposite party being at liberty to inquire whether, notwithstanding the bad character

¹ *R. v. Brown*, 1867, L. R. 1 C. C. R. 70; *R. v. Watson*, 1817, 2 Stark. R. 139; *R. v. De la Motte*, 1781, 1 East, P. C. 124; *Mawson v. Hartsink*, 1802, 4 Esp. 103; *The People v. Mather*, 1830, 4 Wend. 229, 252 (Am.); *The State v. Boswell*, 1829, 2 Dev. 209 (Am.); *Anon.*, 1833, 1 Hill, S. C. 251 (Am.).

² See American cases cited in last note. See ante, § 350.

³ *Gass v. Stinson*, 1837, 2 Sumn. 610 (Am.) (Story, J.); *Kimmel v. Kimmel*, 1817, 3 Serg. & R. 336 (Am.); *Wike v. Lightner*, 1824, 11 Serg. & R. 198 (Am.); *Swift, Ev. (Am.)* 143; *Phillips v. Kingfield*, 1841, 1 Applet. 375 (Am.). In this last case, Shepley, J., ably observed:—"The opinions of a witness are not legal testimony except in special cases; such, for example, as experts in some profession or art, those of the witnesses to a will, and in our practice, opinions on the value of property. In other cases, the witness is not to substitute his opinion for that of the jury; nor are they to rely on any such opinion instead of exer-

cising their own judgment, taking into consideration the whole testimony. To permit the opinion of a witness, that another witness should not be believed, to be received and acted on by a jury, is to allow the prejudices, passions, and feelings of the witness to form, in part, at least, the elements of their judgment. To authorise the question to be put, whether the witness would believe another witness on oath, although sustained by no inconsiderable weight of authority, is to depart from sound principles and established rules of law respecting the kind of testimony to be admitted for the consideration of a jury, and their duties in deciding upon it. It moreover would permit the introduction and indulgence in courts of justice of personal and party hostilities, and of every unworthy motive by which man can be actuated, to form the basis of an opinion to be expressed to a jury to influence their decision."

⁴ *R. v. Watson*, 1817, 2 Stark. R. 139.

of the witness in other respects, he has not preserved his reputation for truth. Indeed, one or two English authorities, apparently, sanction this course;¹ and in several of the United States² the general range of inquiry which is here recommended is distinctly allowed, although a stricter rule is said to prevail in some others of them.

§ 1472.³ It is not, however, enough that the impeaching witness should profess merely to state what he has heard "others" say; for those others may be but few. He must be able to state what is *generally said* of the person, by those among whom he dwells, or with whom he is chiefly conversant; for it is this only which constitutes his general reputation.⁴ Usually, therefore, the witness should himself come from the same neighbourhood as the individual whose character is in question; for a stranger, sent

§§ 1471,
1472.

¹ *R. v. Bookwood*, 1696, 13 How. St. Tr. 211; *Carpenter v. Wall*, 1840, 3 P. & D. 457; *Ld. Stafford's case*, 1680, 7 How. St. Tr. 1459; *Sharp v. Scoging*, 1817, Holt, N. P. R. 541.

As, for instance, North and South Carolina and Kentucky. See *Anon.*, 1833, 1 Hill, S. C. 251 (Am.); *The State v. Boswell*, 1829, 2 Dev. 209 (Am.); *Hume v. Scott*, 1821, 3 A. K. Marsh. 261 (Am.). In this last case, *Mills, J.*, observes:—"Every person, conversant with human nature, must be sensible of the kindred nature of the vices to which it is addicted. So true is this, that, to ascertain the existence of one vice of a particular character, is frequently to prove the existence of more at the same time, in the same individual. Add to this, that persons of infamous character may and do frequently exist, who have formed no character as to their lack of truth; and society may have never had the opportunity of ascertaining, that they are false in their words or oaths. At the same time they may be so notoriously guilty of acting falsehood, in frauds, forgeries, and other crimes, as would leave no doubt of their being capable of speaking and swearing it, especially as they may frequently depose falsehood with greater security against detection, than practise those other vices. In such cases, and with such characters,

ought the jury to be precluded from drawing inferences unfavourable to their truth as witnesses by excluding their general turpitude? By the character of every individual, that is, by the estimation in which he is held by the society or neighbourhood where he is conversant, his word and his oath is estimated. If that is free from imputation, his testimony weighs well. If it is sullied, in the same proportion his word will be doubted. We conceive it perfectly safe, and most conducive to the purposes of justice, to trust the jury with a full knowledge of the standing of a witness, into whose character an inquiry is made. It will not thence follow, that from minor vices they will draw the conclusion, in every instance, that his oath must be discredited, but only be put on their guard to scrutinise his statements more strictly; while in cases of vile reputation in other respects, they would be warranted in disbelieving him, though he had never been called so often to the book as to fix upon him the reputation of a liar, when on oath."

³ *Gr. Ev.* § 461, in part.

⁴ *Boynton v. Kellogg*, 1807, 3 Mass. 189 (Am.); *Wike v. Lightner*, 1824, 11 Serg. & R. 198 (Am.); *Kimmel v. Kimmel*, 1817, 3 Serg. & R. 336 (Am.).

1472— thither by the adverse party purposely to learn the character of
1474. such witness, will not be allowed to testify as to the result of such inquiries.¹ The impeaching witness may, however, be asked on cross-examination the names of the persons whom he has heard speak against the character for veracity of the witness impeached.²

§ 1473. The impeaching witnesses may also be cross-examined as to their means of knowledge and the grounds of their opinion,³ or as to their hostile feelings towards the person whose testimony they have discredited,⁴ or as to their own character and conduct. Moreover, the credit of the witness who has been attacked may be rehabilitated by calling other witnesses either to support the character of the first witness,⁵ or to attack in their turn the general reputation of the impeaching witnesses.⁶ How far this plan of recrimination may be carried is not yet formally determined; though some lawyers say that the practice is in conformity with the doggerel rule of the civil law, "In testem testes, et in hos, sed non datur ultra:" that is, a discrediting witness may himself be discredited by other witnesses, but no further witnesses are allowed to be called to attack the characters of these last.⁷

§ 1474.⁸ After a witness has been cross-examined, the party who called him has a *right to re-examine him*. The proper office of re-examination (which is often inartistically used as a sort of summary of all the things adverse to the cross-examining counsel which may have been said by a witness during cross-examination) is by asking such questions as may be proper for that purpose, so as to draw forth an *explanation* of the meaning of the expressions used by the witness on cross-examination, if they be in themselves doubtful; and also of the motive, or provocation, which induced the witness to use those expressions; but a re-examination may not go further, and introduce matter new

¹ Mawson v. Hartsink, 1802, 4 Esp. 103; Douglass v. Tousey, 1829, 2 Wend. 352 (Am.).

² Bates v. Barber, 1849, 4 Cush. (Mass.) 107 (Am.).

³ Mawson v. Hartsink, 1802, 4 Esp. 103.

⁴ Long v. Lamkin, 1852, 9 Cush.

361, 365 (Am.).

⁵ R. v. Murphy, 1753, 9 How. St. Tr. 724.

⁶ 2 Ph. Ev. 432.

⁷ Lord Stafford's trial, 1680, 7 How. St. Tr. 1459.

⁸ Gr. Ev. § 467, in great part.

n itself, and not suited to the purpose of explaining either the expressions or the motives of the witness.¹ For instance proof, on cross-examination, of a detached statement made by or to a witness at a former time, does not authorise proof by the party calling that witness of all that was said at the same time, but only of so much as can be in some way connected with the statement proved.² Accordingly, a witness who has been cross-examined as to what plaintiff said in a particular conversation, cannot be re-examined as to other assertions, made by the plaintiff in the same conversation, not connected with the assertions to which the cross-examination related, although connected with the subject-matter of the suit.³ But if a witness admits, on cross-examination that he has formerly made statements inconsistent with his present testimony, or if that fact be proved by independent evidence, he may be asked, on re-examination, to explain his motives for making such inconsistent statements.⁴ If, too, upon cross-examination of a witness, counsel, by referring to what such witness has deposed when on a previous occasion giving an account or no account of a transaction, suggests as a reason for disbelieving the witness's present evidence that on the previous occasion he omitted the name of the prisoner at present on his trial, the witness thus impeached may, without the deposition taken on the previous occasion being put in, state that when giving evidence on the previous occasion just referred to, he did give the same account of the transaction as he has just given, and did mention the name of the prisoner at present upon his trial.⁵

§§ 1474,
1475.

§ 1475.⁶ If counsel cross-examines a witness as to *facts which were not* originally and during the examination in chief *admissible in evidence*, the other party has a right to re-examine him as

¹ The opinion of seven out of eight judges in the Queen's case, 1820, 2 B. & B. 287; R. v. St. George, 1840, 9 C. & P. 488.

² The Queen's case, 1820, 2 B. & B. 287 (H. L.); Prince v. Samo, 1838, 7 L. J. Q. B. 123; recognised in Sturge v. Buchanan, 1839, 2 P. & D. 573.

³ Prince v. Samo, 1838. In this case, Ld. Tenterden's opinion in the Queen's case, 1820, 2 B. & B. 287

(H. L.), that evidence of the whole conversation was admissible if connected with the suit, though it related to matters not touched in the cross-examination, was considered and overruled.

⁴ R. v. Woods, 1840, 1 Crawl. & D. C. C. 439 (Ir.).

⁵ R. v. Coll., 1889, 24 L. R. Ir. 522.

⁶ Gr. Ev. § 468, almost verbatim.

**§§ 1475,
1476.**

to such facts. For instance, a witness is not allowed in his examination in chief to "corroborate" himself by vouching a statement previously made by him on oath, but when his veracity is impeached by reference to what he said in such former statement he may, as just mentioned, show by any legal evidence what was really said by him on making such former statement;¹ and on an issue upon a defence of a prescription which justified a trespass in G., plaintiff's witnesses having been asked, in cross-examination, questions respecting the user in other places than G., plaintiff was allowed, in re-examination, to show an interruption in the user in such other places.² An adverse witness ought not, however, to be permitted to obtrude irrelevant matter in answer to a question in no way relating to such matter; and if he do so, the party cross-examining may apply to have the answer struck out of the judge's notes, after which the witness cannot be re-examined on the subject. If the cross-examining counsel omit to take this course, the re-examination on the matter ought, however, to be allowed.³

§ 1476.⁴ Where evidence of contradictory statements, or of other improper conduct on his part, has been either elicited from a witness on cross-examination, or obtained from other witnesses, with the view of impeaching his veracity,—his *general character* for truth being thus, in some sort, *put in issue*,—general evidence that he is a man of strict integrity and scrupulous regard for truth will be admitted.⁵ But evidence that he has on other occasions made statements similar to what he has testified in the cause, is not admissible,⁶ unless, indeed, he has been charged with a design to misrepresent, in consequence of his relation to the party or to the cause, in which case it will be

¹ R. v. Coll., 1889, 24 L. R. Ir. 522.

² Blewett v. Tregonning, 1835, 5 N. & M. 308.

³ Blewett v. Tregonning, 1835, 5 N. & M. 308.

⁴ Gr. Ev. § 469, almost verbatim.

⁵ R. v. Clarke, 1817, 2 Stark. R. 241; Annesley v. Id. Anglesea, 1743, 17 How. St. Tr. 1430 (Ir.). If, however, it be merely brought out by the cross-examination that the witness has been accused of a certain

crime, and tried and *acquitted*, the American cases show that general evidence of his truthfulness is not admissible. See Greenleaf on Ev. 15th edit. (1892), notes to § 469.

⁶ B. N. P. 294; R. v. Parker, 1783, 3 Doug. 242; Anon., undated (Eyr. C.J.), cited 2 Ph. Ev. 523; Berkeley Peer., 1811, 4 Camp. 415 (Ld. Rededale), cited id. These cases overrule Lutterell v. Reynell, 1677, 1 Mod. 284.

proper to show that he made a similar statement before that relation existed.¹ If, too, the character of a deceased attesting witness to a deed or will be impeached on the ground of fraud, evidence of his general good character is admissible.² Mere contradiction among witnesses examined in court affords, however, no ground for admitting general evidence as to their character; ³ though if fraud, or other improper conduct, be imputed to any of them, such evidence will be received.⁴

§§ 1476
1477.

§ 1477. The judge has a discretionary power,⁵ with which the court above is always very unwilling to interfere,⁶ of *recalling witnesses* at any stage of the trial, and of putting to them such legal questions as he thinks that justice requires.⁶ He will seldom, however, except under special circumstances, permit a plaintiff, after his case is closed, to recall a witness to prove a material fact;⁷ though the application will in general be entertained, if made before the closing of the plaintiff's case.⁸ If, too, after a witness has been cross-examined, it be discovered that his testimony at the trial as to the subject-matter of the cause differs from some other statement formerly made by him, the court will allow him, if still within reach, to be recalled and to be further cross-examined, in order to lay a foundation for impeaching his credit by producing witnesses to contradict him.⁹ If, however, he cannot be found, proof of the other statements must be rejected.¹⁰ If a question has been omitted in the examination in chief, it cannot, in strictness, be asked

¹ 2 Ph. Ev. 523, 524; 2 Poth. Obl. 251.

² Doe v. Stephenson, 1801, 3 Esp. 284, 4 Esp. 50; cited and approved (Ld. Ellenborough, in Bishop of Durham v. Beaumont, 1808, 1 Camp. 207; and in Provis v. Reed, 1829, 5 Bing. 435); Doe v. Wood, about 1828; cited (Burrough, J.) 5 Bing. 439.

³ Bp. of Durham v. Beaumont, 1808, 1 Camp. 207.

⁴ Annesley v. Ld. Anglesea, 1743, 17 How. St. Tr. 1430 (Ir.).

⁵ R. v. Watson, 1834, 6 C. & P. 653. In Scotland, 15 & 16 V. c. 27 ("The Evidence (Scotland) Act, 1852"), § 4, expressly enacts, that "it shall be competent to the presiding judge or other person before whom any trial or proof shall pro-

ceed, on the motion of either party, to permit any witness, who shall have been examined in the course of such trial or proof, to be recalled."

⁶ Middleton v. Barned, 1849, 18 L. J. Ex. 433.

⁷ Murray v. Sheriffs of Dublin, 1841, Arm. M. & O. 130 (Ir.); Johnston v. Clinton, 1841, Arm. M. & O. 123 (Ir.); Kelly v. Smith, 1841, Arm. M. & O. 150 (Ir.); Bell v. Stewart, 1842, Arm. M. & O. 401 (Ir.). See Bevan v. M'Mahon, 1839, 28 L. J. P. & M. 40.

⁸ White v. Smith, 1841, Arm. M. & O. 171 (Ir.); Casson v. O'Brien, 1842, Arm. M. & O. 263 (Ir.).

⁹ The Queen's case, 1820, 2 B. & B. 287 (H. L.).

¹⁰ Id.

§§ 1477, on re-examination, as it does not arise out of the cross-examination, but it is usual for the counsel to request the judge to make inquiry; and for such a request to be granted.¹

1478.

§ 1478. Formerly when the evidence of witnesses on opposite sides were directly conflicting, the court would often direct that such witnesses should be *confronted*.² This practice, however, has now fallen into disuse.

¹ 2 Ph. Ev. 473.

² On one remarkable occasion, no less than four witnesses were for this

purpose placed together in the box: *Annesley v. Ld. Anglesea*, 1743, 17 How. St. Tr. 1430 (Ir.).

CHAPTER IV.

PUBLIC DOCUMENTS.

§ 1479.¹ WRITINGS are divisible into two classes, PUBLIC and PRIVATE. Public writings consist of the acts of public functionaries, in the *Executive, Legislative, and Judicial* Departments of Government: including, under this general head, the transactions which official persons are required to enter in books or registers, in the course of their public duties, and which occur within the circle of their own personal knowledge and observation. Foreign acts of State, and the judgments of foreign Courts also belong to the class of Public Documents. In the present chapter it is proposed to treat of all such public documents; and the inquiry will be directed first, to the MEANS OF OBTAINING AN INSPECTION OR COPY of them; secondly, to the METHOD OF PROVING them; and thirdly, to their ADMISSIBILITY AND EFFECT.

§§ 1479,
1480.

§ 1480. In former times it was apparently necessary to obtain the sanction of the Attorney-General to entitle any private person to inspect, or take copies of, the *general records of the realm*.² At the commencement, however, of the present reign, the Public Record Office Act, 1838, was passed.³ By it most of these invaluable documents were placed under the charge and superintendence of the Master of the Rolls. The Act contains, indeed, no section directly entitling the public to inspect these documents, or declaring whether they have any, or what, remedy, in the event of their being refused access to them; but, after a preamble stating that "it is expedient to establish one Record Office and a better custody, and to allow the free use of

¹ Gr. Ev. § 470, in great part.

² *Legatt v. Tollervey*, 1811, 14 East, 301; *Doe v. Date*, 1842, 3 Q. B. 609.

³ 1 & 2 V. c. 94. See, also, "The Public Records (Ireland) Act, 1867" (30 & 31 V. c. 70), Ir.

§§ 1480
1491.

any public records, as far as stands with their safety and integrity, and with the public policy of the realm," it empowers the Master of the Rolls to make rules "for the admission of such persons as ought to be admitted to the use of such records," and "to fix the amount of fees, if any," to be paid for such use;¹ and authorises either the Master of the Rolls, or the Deputy Keeper of the Records, to allow copies to be made of any of the documents "at the request and cost of any person desirous of procuring the same." The Act further provides that any copy so made shall be examined and certified as a true and authentic copy by the Deputy Keeper of the Records, or one of the Assistant Record Keepers, and shall be sealed or stamped with the seal of the Record Office and delivered to the party for whose use it was made.² The Act further provides that every copy of a Record in the custody of the Master of the Rolls so certified and purporting to be sealed or stamped with the seal of the Record Office, shall be received as evidence in all Courts of Justice, and before all legal tribunals, and before either House of Parliament or any Committee of either House, without any further or other proof thereof in every case in which the original record could have been received there as evidence.³

§ 1481. In exercise of the powers conferred by the Act the late Lord Langdale directed,⁴ that all the public record offices should be open daily, excepting on Sundays and a few holidays,⁵—prescribed a reasonable scale of fees,⁶ which were not chargeable at all to "*literary inquirers*,"⁷—and instructed the assistant-keepers to give to all applicants every information and assistance in their power, not merely from the calendars and indexes, but also from their own knowledge of records.⁸ Indeed, in a letter to the Premier, shortly after the passing of the Act, he remarked that the Records are justly called the *Muniments of the*

¹ 1 & 2 V. c. 94 ("The Public Record Office Act, 1838"), § 9; 30 & 31 V. c. 70, § 17, 1r.

² 1 & 2 V. c. 94, § 12; 30 & 31 V. c. 70, § 19, 1r.

³ 1 & 2 V. c. 94, § 13.

⁴ In 11 Beav. xxii. et seq., the rules are set out at length.

⁵ 2nd Rep. of Dep.-Keeper of Pub. Rec. i., App. p. 14.

⁶ Id. p. 15.

⁷ Letter of Lords of the Treasury, dated 17th Nov., 1851.

⁸ 2nd Rep. of Dep.-Keeper of Pub. Rec. i., App. p. 15.

Kingdom and the People's Evidences: and that they ought to be kept and managed under such arrangements as may afford to the public the greatest facility of using them that is consistent with their safety, while the public should have access to them for the purpose of easily obtaining information upon the subjects to which the records relate, and ought to be enabled easily to obtain authentic copies of all documents, which can be adduced as evidence in the establishment or defence of rights, which are at issue in the course of judicial or Parliamentary proceedings.¹

§ 1482. The late Lord Romilly, when Master of the Rolls, in 1866, on the opening of the New Search Rooms,² abolished all fees whatever for searches and inspections, permitting each searcher to take notes, or even examined copies, of any records, gratis,³ and retained only moderate fees for the furnishing of authenticated copies of documents, or for the attendance of clerks as witnesses.⁴

§ 1483. It would be difficult to establish that the *public have a strict legal right to inspect these records, except as to the records of the superior Courts of law or equity*; and it is doubtful whether the Queen's Bench Division of the High Court would interfere by mandamus to enforce an inspection even of these, unless the applicant could show that he was interested in the

¹ Dated 7th Jan., 1839, and cited 1st Rep. of Dep.-Keeper of Pub. Rec. App. 67.

² Open every day, except Sunday, Christmas Day to New Year's Day inclusive, Good Friday and the Saturday following, Easter Monday and Tuesday, Whit Monday and Tuesday, Her Majesty's Birthday 24th May, and Coronation Day 28th June, and days appointed for public fasts or thanksgivings. Hours of

attendance from 10 till 4 o'clock, except on Saturday, when closed at 2. See 28th Rep. of Dep.-Keeper of Pub. Rec. p. iv.

³ "A searcher may take notes, or a full copy of any record, and examine the same with the record with his own agent; but no officer shall examine, correct, or certify such copy or extracts. Tracings are not allowed without permission." 28th Rep. of Dep.-Keeper of Pub. Rec. p. iv.

⁴ The table of fees is (see 28th Rep. of Dep.-Keeper of Pub. Rec. App. 2) as follows:—

		£	s.	d.
For authenticated copies, per folio of 72 words :				
Docum. to the end of reign of G. 2		0	1	0
Docum. after reign of G. 2		0	0	6
For attend. at either H. of Parl. to be sworn		1	1	0
Do. do. or elsewhere to give evid. ; or with				
10 records or less number, each day		2	2	0
Do. at either H. of Parl. for each additional record, each day		0	2	0
For attend. on Master of the Rolls on a Vacatur		1	1	0
Do. to receive mortgage-money		0	5	0
On payment of mortgage-money		0	10	6

§§ 1483— document of which he sought inspection.¹ If, too, the disclosure of the contents of any of the general records of the realm, or of any other documents of a public nature, would, in the opinion of the court, or of the chief executive magistrate, or of the head of the department under whose control they may be kept, be injurious to the public interests, an inspection would certainly not be granted.²

1485.

§ 1484. A general *Record Office*, in lieu of the many repositories which previously existed, has (as contemplated by "The Public Record Office Act, 1838" (1 & 2 V. c. 94) been established in a building erected on the Rolls Estate in Fetter Lane.³ To this all the records, formerly deposited in the Tower of London, the Carlton Ride, and the Chapter House at Westminster, and many of those which used to be kept in the Rolls House and Chapel, and in the State Paper Office,⁴ have been removed. The Tower adjoining the Chapter House at Westminster (and formerly the prison of the Monastery there), is still the repository for all original Acts of Parliament.

§ 1485. The documents which are now placed under the custody of the Master of the Rolls are very numerous.⁵ Very

¹ See *R. v. Staffordshire JJ.*, 1837, 6 A. & E. 99 (Ld. Denman) and see further *infra*, § 1493.

² Ante, §§ 939, 947.

³ The Public Record Office for Ireland is in Dublin, near the Four Courts.

⁴ Some of the State Papers of the last half century are deposited in two houses in Whitehall Yard.

⁵ Among such records now under the custody of the Master of the Rolls are, mentioned in alphabetical order, the following: *Admiralty* documents, including the records of the Admiralty Courts, the log-books of the Navy, and various branches of the correspondence and documents of the Admiralty and Navy Boards; the *Alienation Office* records; the *Augmentation Office* records; *Chancery suitors'* deeds, books, and documents (see 23 & 24 V. c. 149, § 9; Gen. Ord. in Chanc. 22nd May, 1866; 42 & 43 V. c. 78, Sched. I.; and R.S.C. 1883. Ord. LX. r. 3; Ord. LXI. r. 1); the *Charity Commission* papers; the

Chester Circuit fines and recoveries, and other records; the *Chirographer's Office* records; Court of Chivalry proceedings in some cases; the *Clerk of the Estreats Office*, and the *Clerk of the Nichils Office* records; *Close Rolls*; *Colonial* papers of various sorts; the Superior Courts of *Common Law* records which are more than twenty years old; *Crown Lands* surveys in some cases; *Domesday Book*; the Superior Courts of *Equity* records when more than twenty years old; the records of *First Fruits and Tithes*; the *Foreign Apposer Office* records; *Foreign Office* papers: comprising (inter alia) many important transcripts from the royal or public archives of Bavaria, Belgium, France, Hamburg, Italy, Normandy, Portugal, Prussia, Saxony, and Switzerland, which latter, however, are not in his official custody under the Act, but are merely deposited with the Master of the Rolls for convenience: *Forfeited Estates* records; the *French Claim Commission* papers; the *King's*

many of the documents in his custody are, it will be observed, not strictly records; but it has been provided,¹ that the word "records" in that Act is to be taken to mean all rolls, records, writs, books, proceedings, decrees, bills, warrants, accounts, papers, and documents whatsoever of a public nature, belonging to his Majesty, or deposited on the 14th of August, 1838, in any of the offices or places of custody in the Act mentioned.²

§§ 1485,
1486.

§ 1486. Besides the above records, which are now placed in his actual custody, the Master of the Rolls has control of many other documents of a public character, the custody of which belongs to particular courts and offices, and which are severally deposited in various places in London.³

Silver Office records; *Land and Assessed Taxes* duplicates; the *Land Revenue Record Office* records, and some other records relating to the land revenue (as to others, see § 1486); the *Lord Chamberlain's Office* and the *Lord Treasurer's Remembrancer's Office* records; the *Marshalsea Court* records, muniments, and writings; *Miscellaneous* documents, such as calendars, indices, minute-books, &c., collected by the late Record Commissioners, or by persons employed by them; the dissolved *Monasteries, Priors, &c.*, lieger-books and chartularies; the *Palace Court* records; *Parliament Rolls*; *Patent Rolls*; the *Pell* records; the *Peveril Court* records; the *Pipe Office* records; the *Placita Forestæ*; *Population* returns; the Court of *Star Chamber* proceedings, in some cases; *Statute* rolls; the *Surveyor of Green Wax Office* records; many *Treasury* papers of various descriptions; *War Office* papers; the Court of *Wards and Liveries* records; many *Welsh Courts* equity records; and some very valuable home, foreign, colonial and Treasury papers. The above list is compiled from the annual reports of the Deputy-Keeper of the Public Records, but it is not offered as anything like a complete list, though believed to be accurate as far as it goes. For an enumeration of the public records in Ireland, see "The Public Records (Ireland) Act, 1867" (30 & 31 V. c. 70, Ir.), § 4.

Record Office Act, 1838").

² See §§ 20, and 1 & 2. See, also, 30 & 31 V. c. 70, §§ 3, 5, Ir.; and 38 & 39 V. c. 59, Ir. Under this last Act many parochial records have been transferred to the Irish Record Office.

³ Among the principal of these documents, and their places of deposit, are the following:—*Duchy of Cornwall* records, in the Duchy Office at Buckingham Gate; *Duchy of Lancaster* records, in the Duchy Office at Lancaster Place, Waterloo Bridge; *Heralds' College* records (as to which see Hubb. Ev. of Suc. 538—566), which are either in the *Heralds' College*, on St. Benet's Hill, near St. Paul's, or in the Harleian Library; *Indian Records of Baptisms, Marriages, and Burials* (viz., those in Bengal from 1713 to 1737; those at Madras from 1698 to 1834; those in Bombay from 1709 to 1837; and those in St. Helena from 1767 to 1835), at the office of the Secretary of State for India in Charles Street, St. James's Park, as to which Indian Registers see p. 13 of Report of Commissioners appointed to make inquiries as to Non-parochial Registers, published in 1838, and also the case of *Regan v. Regan*, 1893, 67 L. T. 720, which decides that a register compiled by the Secretary of State for India from reports sent him from India by clergymen of various denominations is admissible as evidence; *Land Revenue* records (see 2 W. 4, c. 1, otherwise "The Crown Lands Act, 1832," §§ 15, 20, 22), at the "Office

¹ By 1 & 2 V. c. 94 ("The Public

§ 1487.

§ 1487. In 1857, the Act establishing the Court of Probate,—now the Probate Division of the High Court—directed that all persons who heretofore either had jurisdiction to grant probate or administration, or had the custody of the papers of any old Court of Probate, upon receiving from a registrar a requisition under the seal of the Probate Court thereby established, should transmit to the place specified in such requisition, “all [or one or more¹] records, wills, grants, probates, letters of administration, administration bonds, notes of administration, court books, calendars, deeds, processes, acts, proceedings, writs, documents, and every other instrument relating exclusively or principally to matters or causes testamentary, to be deposited and arranged in the registry of each district or in the principal registry, as the case may require, so as to be of easy reference, under the control and direction of the court,”² and provided that there should be “one place of deposit under the control of the court,”³ in which all the original wills brought into the court,

of Land Revenue Records and Enrolments” in Spring Gardens, which include (see *i* & 8 V. c. 89) the audited accounts of the Commissioners of Woods and Forests, though (see ante, § 1485), as before mentioned, many of these records are in the Record Office; and the *Registers of Births, Baptisms, Marriages, and Burials of British Subjects beyond Seas*, transmitted from different British embassies and factories on the Continent of Europe and elsewhere, which (since 1816) have been in the registry of the Consistory Court of London, and may be divided into the three following classes:—(1) Certificates, in the original books, of baptisms and marriages, bearing the signatures of the parties and witnesses, and authenticated by the chaplain performing the ceremony, the parties, and the British envoy or minister at whose house such ceremony was performed, which have from time to time been sent through the Foreign Office to the registry of the Bishop of London, among which are registers from the Cape of Good Hope, Geneva, Gibraltar, and Oporto (between 1706 and 1802); (2) Transcripts, consisting of a book of

transcripts from the register kept at the British Embassy in Paris from 1816 to the present time; a transcript of the similar registers kept at St. Petersburg from 1706 to the present time; and also of transcripts from original registers, certified by the ministers of the different places in the same manner as transcripts under 52 G. 3, c. 146; (3) A book of registers from Cronstadt, which appear to have been transcribed, but which are not in any way certified as having been so;—as to the whole of which registers in the Consistory Court of London, see p. 11 of Report just cited.

¹ This amendment was introduced into the Eng. Act by § 27 of 21 & 22 V. c. 95.

² 20 & 21 V. c. 77 (“The Court of Probate Act, 1857”), § 89; 20 & 21 V. c. 79, § 96, *Ir.*

³ This place was formerly at No. 6, Great Knight-riding Street, Doctors’ Commons. See Gazette of 4th Dec., 1857. But by requisition made under the Act, (no Order in Council appears to have been made on this occasion) all old wills have been removed to, and now are at, the Registry of the Probate Division at Somerset House.

or of which probate or administration with the will annexed is granted under this Act in the principal registry thereof, and copies of all wills the originals whereof are to be preserved in the district registries, and such other documents as the court may direct, shall be deposited and preserved, and may be inspected, under the control of the court, and subject to the rules and orders under this Act."¹ The Act also directed the judge of the court to cause calendars of the grants of probate and administration to be made and printed from time to time, and copies of them deposited in the district registries, the office of his Majesty's Prerogative in Dublin, the office of the commissary of the county of Midlothian in Edinburgh, and such other offices as the court might order, which should be open to inspection "by any person on payment of a fee of one shilling for each search, without reference to the number of calendars inspected."²

§§ 1487,
1488.

§ 1488.³ The inspection and exemplification of the *Records of the King's Courts*, when they are required for the purpose of being given in evidence, have been admitted, from a very early period, to belong to the public of *common right*. This right was, by an ancient ordinance or statute,⁴ extended to cases where the subject was concerned against the Crown, but the statute⁴ giving that right was repealed in 1871.⁵ A prisoner charged either with high treason or felony has, at common law, only the rights given by the rule which will be presently stated, and (as he does not require it for the purpose of being given in evidence) is certainly not entitled, except by statute, to a copy of any indictment, or other of the proceedings against him.⁶ By statutes of the time of Will. III.⁷ and of Anne,⁸ however, in most cases of *treason*, the accused must now be supplied, ten clear days before his trial, with a copy of the indictment. The rule in ordinary cases of felony, however, even at the present day, is that the

¹ 20 & 21 V. c. 77 ("The Court of Probate Act, 1857"), § 66; 20 & 21 V. c. 79, § 71, Ir.

² 20 & 21 V. c. 77, §§ 67, 68. See, also, 20 & 21 V. c. 79, §§ 72, 73, Ir.

³ Gr. Ev. § 470, in part, as to first five lines.

⁴ 46 E. 3.

⁵ "The Statute Law Revision Act,

1871" (34 & 35 V. c. 116).

⁶ R. v. Ld. Preston, 1791, 12 How. St. Tr. 658.

⁷ 7 W. 3, c. 3 ("The Treason Act, 1695"), § 1.

⁸ 7 A. c. 21 ("The Treason Act, 1708"), § 11, extended to Ireland by 17 & 18 V. c. 26. See, also, 5 G. 3, c. 21, Ir.

§§ 1488,
1489.

accused is not entitled to a copy of the indictment; but all that he can claim as of right is, to have it read slowly to him in open court;¹ and this rule includes that class of treasons which consists in compassing the death or personal injury of the Sovereign.² The rule,—which is the very essence of injustice,³—does not *extend to misdemeanors*, on charges of which the accused is, both by common and statute law, entitled to a copy of the indictment, in spite of the fact that a person on trial for his life may possibly not possess this right.⁴ A prisoner committed for trial or held to bail, preparatory to being tried for some indictable crime,⁵ is also by statute⁶ entitled not only to inspect at the trial, without fee, the depositions upon which he has been so committed or held to bail, but also to obtain copies of them on payment of a small sum, and this whatever be the nature of the offence imputed.⁷

§ 1489. It has been doubted whether a person *tried for felony*

¹ *R. v. Parry*, 1837, 7 C. & P. 836 (Bolland, B.); *R. v. Vandercomb*, 1796, 6 How. St. Tr. 123; *R. v. Cruise*, 1842, Ir. Cir. R. 674. (Torrans, J.). Though this seems to be also the law in Ireland, it is curious that, in 1641, the Irish Judges unanimously resolved that they had no power by law to refuse to give to the accused a copy of the indictment; and the Irish House of Commons in the same year declared, that judges ought not to deny copies of indictments to parties indicted. See an able note on this subject in Ir. Cir. R. 375—378. See, also, *Bothe's case*, 1602, Moo. (F.) 666.

² See 39 & 40 G. 3, c. 93 ("The Treason Act, 1800"); 1 & 2 G. 4, c. 24, § 2, Ir.; 5 & 6 V. c. 51 ("The Treason Act, 1842"), § 1. See, also, ante, § 958.

³ Mr. Chitty observes on this subject, "It is a remarkable circumstance that the English law should allow so much nicety to prevail with respect to formal defects in the indictment, and yet afford the defendant so little opportunity of discovering them." 1 Chit. Cr. L. 403. The flagrant absurdity of the one rule caused the equally flagrant injustice of the other.

⁴ *Lady Fulwood's case*, 1637, Cro. Car. 483; 1 Chit. Cr. L. 404. See, also, 60 G. 3 & 1 G. 4, c. 4, § 8; and 7 & 8 G. 4, c. 53 ("The Excise Management Act, 1827"), § 42.

⁵ A person who has been committed for want of sureties to keep the peace cannot demand a copy of the examinations on which the commitment proceeded: *R. v. Herefordshire JJ.*, 1850, 19 L. J. M. C. 189.

⁶ 6 & 7 W. 4, c. 114, § 4, enacts, that, "all persons under trial shall be entitled, at the time of their trial, to inspect, without fee or reward, all depositions (or copies thereof) which have been taken against them, and returned into the court before which such trial shall be had."

⁷ 11 & 12 V. c. 42 ("The Indictable Offences Act, 1848"), § 27, enacts, that "at any time *after* the examinations aforesaid shall have been completed, and *before* the first day of the assizes or sessions, or other first sitting of the court, at which any person so committed to prison or admitted to bail as aforesaid is to be tried, such person may require and be entitled to have of and from the officer or person having the custody of the same, copies of the depositions on which he shall have been com-

and acquitted is entitled to a copy of the record of his acquittal, for the purpose of giving it in evidence in an action for malicious prosecution.¹ This doubt has arisen in consequence of an order made by five judges, *temp.* Charles II., for the regulation of the Sessions at the Old Bailey, directing, that "no copies of any indictment for felony be given without special order upon motion made in open Court, at the general gaol delivery upon motion ;² for the late frequency of actions against prosecutors, which cannot be without copies of the indictments, deterreth people from prosecuting for the King upon just occasions."³ But this order appears to be directly at variance with the Act of 46 Edward III.,—which (as may be gathered from what has been stated just now in § 1488) was in force at the date when such order was made,—and to be also wholly inconsistent with the provisions of Magna Charta, "*nulli negabimus vel differemus justitiam.*" In the case of an evidently vexatious prosecution, where the prisoner, after acquittal, applied to Willes, C.J., for a copy of the indictment, his lordship refused to make an order on the subject, on the ground that none was necessary ; declaring that by the laws of this realm, every prisoner, upon his acquittal had an undoubted right to a copy of the record of such acquittal,

§ 1489.

mitted or bailed, on payment of a reasonable sum for the same, not exceeding at the rate of three halfpence for each folio of ninety words." See, also, "The Coroners Act, 1887" (50 & 51 V. c. 71), § 18, sub-sect. 5, enacting that "a person charged by an inquisition with murder or manslaughter shall be entitled to have, from the person having for the time being the custody of the inquisition, or of the depositions of the witnesses at the inquest, copies thereof on payment of a reasonable sum for the same, not exceeding the rate of three halfpence for every folio of ninety words." As to Ireland, § 14 of 14 & 15 V. c. 93, enacts, that "at any time after the examinations in any proceedings for an indictable offence shall have been completed, and on or before the first day of the assizes or sessions, or other first sitting of the court at which any person committed to gaol or admitted

to bail is to be tried, such person may require and shall be entitled to receive from the officer or person having the custody of the same, copies of the depositions on which he shall have been committed or bailed (or copies of depositions taken at any inquest in case of murder or manslaughter), on payment of a reasonable sum for the same, not exceeding a sum at the rate of three halfpence for each folio of ninety words." See, also, 44 & 45 V. c. 35, § 9, Ir.

¹ *Browne v. Cumming*, 1829, 10 B. & C. 70. In *R. v. Dunne*, 1838, Ir. Cir. R. 407, the court refused to allow a convicted prisoner a copy of the depositions of a Crown witness, for the purpose of assigning perjury upon them.

² Sic.

³ 7th Res., cited in *Kel. 3* (Hyde, C.J., O. Bridgman, C.J., Twisden, Tyril, and Kelyng, JJ.).

§§ 1489— for any use he might think fit to make of it; and that, after a
 1491. demand of it had been made, the proper officer might be punished for refusing to make it out.¹

§ 1490. If this view be correct (as it is submitted it is), the Old Bailey order, though confirmed by a decision of *Ld. Holt*,² is illegal. In any event, first, the order does not extend to misdemeanors, but in such cases the prisoner has an absolute right to a copy of the indictment on which he has been either acquitted or convicted;³ secondly, even in cases of felony, where the party acquitted brings an action for malicious prosecution, the judge at *Nisi Prius* is bound to receive in evidence a true copy of the indictment, though proved to have been obtained without an order;⁴ and lastly, for the purpose of pleading *autrefois acquit*, or *autrefois convict*, the prisoner is entitled to have a copy of the former record, whatever be the nature of the accusation; and if the court where he was first tried refuses to grant him one, the Queen's Bench Division of the High Court will enforce his right by *mandamus*.⁵

§ 1490A. A person tried by court-martial is entitled, on demand, in the case of a general court-martial within seven years, and in the case of any other court-martial within three years, after the confirmation of the sentence, to obtain from the officer having custody of the proceedings a copy of the same, including those with respect to the confirmation, upon payment for the same at the prescribed rate, not exceeding twopence for every seventy-two words.⁶

§ 1491. Independently of the general law governing the right to inspect and take copies of the records of courts of justice, the Bankruptcy Act⁷ and Rules of 1883 contain several special regulations on the subject. B. R. 10, after declaring that "all proceedings of the court shall remain of record in the court," provides "they may at all reasonable times be inspected by the trustee, the bankrupt, and any creditor who has proved, or any person on their behalf." R. 14 provides that, "all office copies

¹ *R. v. Brangan*, 1742, 1 *Lea*. C. C. 27. See, also, *Doe v. Date*, 1842, 3 Q. B. 609.

² *Groenvelt v. Burrell*, 1696-7, 1 *Ld. Raym.* 253.

³ *Morrison v. Kelly*, 1762, 1 *W. Bl.* 385; *Evans v. Phillips*, 1763, 2 *Selw. N. P.* 1072.

⁴ *Legatt v. Tollervey*, 1811, 14 *East*, 301; *Jordan v. Lewis*, 1739-41, 14 *East*, 305, n.

⁵ *R. v. Middlesex JJ.*, *In re Bowman*, 1834, 5 *B. & Ad.* 1113.

⁶ Under "The Army Act, 1881" (44 & 45 *V. c.* 59), § 124.

⁷ 46 & 47 *V. c.* 52.

of petitions, proceedings, affidavits, books, papers, and writings, or any parts thereof, required by any trustee, or by any debtor, or by any creditor, or by the *solicitor* of any such person, shall be provided by the Registrar," without any unnecessary delay, and in the order in which they shall have been bespoken. By § 16, sub-a. 4, of the Act itself, any person, stating himself in *writing* to be a creditor, may at all reasonable times, personally or by agent, inspect, or take any copy of, or extract from, the debtor's statement of affairs, which has been submitted to the official receiver. Under § 17, sub-s. 8, after the debtor has been publicly examined by the court, the note of his examination may be inspected by any creditor at all reasonable times. Every creditor, too, who has lodged a proof of his claim, is entitled at all reasonable times, and even before the first meeting, to examine the proofs of the other creditors.¹ The audited accounts of the trustees, copies of which are filed with the court, are, too, "open to the inspection of any creditor, or of the bankrupt, or of any person interested";² and all books kept by the trustees may, subject to the control of the court, be inspected by any creditor or by his agent.³ The trustee must also, when required by any creditor, and on payment of the proper fee, transmit to him by post a list of the creditors, showing the debt due to each creditor.⁴

§§ 1491,
1491a.

§ 1491A. The Rr. S. C., 1888, contain several provisions for facilitating the inspection of the numerous and varied documents now deposited in the Central Office of the Royal Courts of Justice.^b

¹ Sched. II. of the Act, r. 7.

³ § 80.

² § 71, sub-sect. 4.

⁴ § 79.

^b Ord. LXI. (which contains the most important of these rules), by r. 1 provides:—"The Central Office shall, for the convenient despatch of business, be divided into the departments specified in the first column of the following scheme, and the business of the office shall be distributed among the departments in accordance with that scheme, and shall be performed by the several officers and clerks in the said office who are now charged with the same or similar duties, and by such others as may from time to time be appointed by lawful authority for that purpose.

SCHEME.

Name of Department.	Business.
1. Writ, appearance, and judgment.	The sealing and issue of writs of summons for the commencement of actions. The entry in the cause book of writs of summons, appearances, and judgments.

§ 1491a. R. S. C., O. LX., R. 17, provides that "proper indexes or calendars to the files or bundles of all documents filed at the Central Office shall be kept, so that the same may be conveniently referred to when required; and such *indexes or calendars and documents* shall, at all times during office hours be *accessible to the public* on payment of the usual fee."

R. 18 provides, that "there shall also be entered in proper books kept for the purpose the time when any certificate is delivered at the Central Office to be filed, with the name of the cause and the date of the certificate; and the like entry shall be

SCHEME—*continued.*

Name of Department.	Business.
1. Writ, appearance, and judgment— <i>continued.</i>	The sealing and issue of notices for service under Ord. XVI. r. 48. The receipt and filing of pleadings and notices delivered on entry of judgment. The transaction of all business heretofore conducted in the Record and Writ Office, except such part thereof as is transacted in the Record Department.
2. Summons and Order	The issue of summonses in the King's Bench Division, and the drawing up of all orders made either in court or in chambers in that division.
3. Filing and Record	The filing of all affidavits to be filed in the Central Office, and all depositions to be used in the Chancery Division, and such other documents as may from time to time be directed by the Master to be filed, and the making and examination of office copies of documents filed in the department. The custody of all deeds and documents ordered to be left with the Masters. The business heretofore performed in the Report Office under the direction and control of the Clerk of Records and Writs.
4. Taxing	The taxation of costs in the King's Bench Division, except such costs as have heretofore been taxed in the Queen's Remembrancer's Office or the Crown Office.
5. Enrolment	The business heretofore performed in the Enrolment Office.
6. Judgments and married women's acknowledgments.	The registry of acknowledgments of deeds by married women.
7. Bills of Sale	The registry of bills of sale and other duties connected therewith.
8. King's Remembrancer	The business heretofore performed in the King's Remembrancer's Office.
9. Crown Office	The business heretofore performed in the Crown Office.
10. Associates	The business heretofore performed in the Associates' Offices."

made of the time of delivery of every other document filed at the Central Office; and *such books* shall, at all times during office hours, be *accessible to the public* on payment of the usual fee.” §§ 1491a, 1491b.

R. 23 provides, that “the Clerk of Enrolments and each of the following Registrars, namely—

(a.) The Registrar of Bills of Sale;¹

(b.) The Registrar of Certificates of Acknowledgments of Deeds by Married Women;

(c.) The Registrar of Judgments;²

shall on a request in writing giving sufficient particulars, and on payment of the prescribed fee, cause a search to be made in the registers or indexes under his custody, and issue a certificate of the result of the search.”

R. 24 states, that “for the purpose of enabling all persons to obtain precise information as to the state of any cause or matter, and to take the means of preventing improper delay in the progress thereof, the proper officer shall, at the request of *any person*, whether a party or not to the cause or matter inquired after, but on payment of the usual fee, give a *certificate* specifying therein the dates and general description of the several proceedings which have been taken in such cause or matter in the Central Office.”

§ 1491b. Independently of the Rules just cited, every person is entitled by statutory authority to inspect, on payment of a small sum, the *warrants of attorney* to confess judgment, the *cognovits actionem*, the *judge's orders* to enter up judgment by consent, and the *bills of sale* of personal chattels, which must now be filed or registered in the Bills of Sale Department of the Central Office³—the first three classes of documents within twenty-one days,⁴ and Bills of Sale within seven days,⁵ after their respective execution or making; as also the books and indexes relating to these documents, which the proper officer of the Central Office is directed to keep.⁶ When a bill of sale has

¹ See post, § 1521.

² By § 1 (1) of “*The Land Charges Act, 1900*” (63 & 64 V. c. 26), and the Order of the Lord Chancellor of 3rd Aug., 1900, the business of the Registrar of judgments has been transferred to the office of Land Registry, 33, Lincoln's Inn Fields.

³ Ord. LXI. r. 1, cited ante, § 1491A, n. 4.

⁴ 3 G. 4, c. 39, §§ 1, 2, 3, 5; 32 & 33 V. c. 62, §§ 26—28.

⁵ 45 & 46 V. c. 43, § 8; 46 V. c. 7, § 8, *Ir.*

⁶ 3 G. 4, c. 39, §§ 5, 6; 6 & 7 V. c. 66; 32 & 33 V. c. 62, §§ 26—28;

§§ 1491b
—1492.

been given by a person residing "outside the London bankruptcy district," or whose chattels are outside such district, an abstract of the contents of such bill of sale must be transmitted from the Central Office to the local County Court Registrar, who must file and index the same; and "any person may search, inspect, make extracts from, and obtain copies of, the abstract so registered."¹

§ 1491c. Again, all persons are at liberty, on payment of the authorised fee,² to search the books kept at the Land Registry Office³ and which contain a list of the persons whose real estate is intended to be affected by the judgments, decrees, orders, or rules of the courts, or by orders in lunacy.

§ 1492.⁴ It is highly questionable whether the *records of inferior tribunals* are open to the inspection of all persons without distinction;⁵ but it is clear, that everyone has a *right to inspect and take copies* of the parts of the proceedings in which he is *individually interested*. The party, therefore, who wishes to examine any particular record of one of those courts, should first apply to that court, showing that he has some interest in the document in question, and that he requires it for a proper purpose.⁶ If his application be refused, either the Chancery, or the King's Bench, Division of the High Court, upon affidavit of the fact, may send either for the record itself or an exemplification; or the latter court will, by mandamus, obtain for the applicant the inspection or copy required. A person convicted under the game laws, afterwards having an action brought against him for the same offence, was held entitled to a copy of the conviction; and this having been refused, a writ of certiorari was granted for the mere purpose of procuring a copy, and thus enabling the action

41 & 42 V. c. 31, § 12; 45 & 46 V. c. 43, § 16. See, also, 46 V. c. 7, § 16, Ir.

¹ 45 & 46 V. c. 43, § 11; 46 V. c. 7, § 11, Ir. In Ireland, the abstract is sent to the local clerk of the peace.

² The fees are fixed by the Order of the Lord Chancellor made under the Land Charges Act, 1900, and dated 8th August, 1900.

³ By "The Land Charges Act, 1900" (63 & 64 V. c. 26), the busi-

ness of the Registrar of Judgments formerly conducted in the Central Office of the Supreme Court was removed to the Land Registry.

Gr. Ev. § 473, in some part.

R. v. Chester, 1819, 1 Chitty, R. 297, questioning Herbert v. Ashburner, 1750, 1 Wils. 297.

⁶ See R. v. Wilts. and Berks. Can. Co., 1835, 3 A. & E. 47; R. v. Leicester JJ., 1825, 4 B. & C. 892.

to be defeated.¹ So the court has granted a party—who having been taken in execution in a court of conscience,² has brought an action of trespass and false imprisonment—a rule to inspect so much of the book of the proceedings as related to the suit against himself.³

§§ 1492—
1494.

§ 1493. Indeed, as a general rule, the King's Bench Division will enforce by *mandamus* the production of every document of a public nature, in which any one of his Majesty's subjects can prove himself to be interested.⁴ Every officer appointed by law to keep records, ought, therefore, to deem himself a trustee for all interested parties, and allow them to inspect such documents as concern themselves,—without putting them to the expense and trouble of making application for a *mandamus*.⁵ But the applicant must show some direct and tangible interest in the documents sought to be inspected, and that the inspection is *bonâ fide* required on some special and public ground,⁶ or the court will not interfere in his favour; consequently, if his object be merely to gratify a rational curiosity, or to obtain information on some general subject, or to ascertain facts which may be indirectly useful to him in some ulterior proceedings, he cannot claim inspection as a right capable of being enforced.⁷ Thus, the ratepayers of a county are not entitled to inspect and copy the bills of charges of county officers, which, having been paid by the treasurer under orders of justices, have become items in his accounts, and which have been allowed by the sessions, and deposited by the clerk of the peace among the county records.⁸ For in such case, the individual ratepayers would have no power to interfere, even though they might prove to demonstration that the bills had been improperly paid and allowed.

§ 1494.⁹ Moreover, there are some books and documents which

¹ *R. v. Midlam*, 1765, 3 Burr. 1720.
² "Courts of Conscience" were tribunals for the recovery of small debts constituted by Acts of Parliament in the City of London and other towns, now superseded by the County Courts.

³ *Wilson v. Rogers*, 1745-6, 2 Str. 1242.

⁴ *R. v. Staffordshire JJ.*, 1837, 6 A. & E. 99.

⁵ *Id.*

⁶ *Ex parte Briggs*, 1859, 28 L. J. Q. B. 272.

⁷ *R. v. Staffordshire JJ.*, 1837, 6 A. & E. 99.

⁸ *Id.*; overruling *R. v. Leicester JJ.*, 1825, 4 B. & C. 892. See, also, *R. v. St. Marylebone*, 1836, 5 A. & E. 268.

⁹ *Gr. Ev.* § 474, as to first three lines.

**§§ 1494,
1495.**

partake *both of a public and private character*, and are treated as the one or the other according to the relation in which the applicant stands to them. Thus, a stranger has no right to an inspection of the *rolls of copyhold courts* and of courts baron;¹ but the *copyhold tenants* of a manor are clearly entitled to inspect and take copies of such parts, though of such parts only,² of the court rolls, as relate to their own titles, privileges, or interests; and this, too, whether an action be pending or not.³ Indeed, by a general rule of court,⁴ “an order upon the lord of a manor to allow limited inspection of the court rolls, may be made on the application of a copyhold tenant, supported by an affidavit that he has applied for inspection, and that the same has been refused.” This right is not strictly confined to cases where the applicant is a copyhold tenant; but if he has a *prima facie* title to a copyhold,⁵ or is otherwise interested in copyhold property,⁶ as, for instance, if he is the devisee of a rent-charge on such property,⁷ the court will make the order. Even a *freehold tenant* of a manor has a right to inspect the court rolls;⁸ though it may, perhaps, be doubtful, whether he must not first show that some suit is actually depending.⁹

§ 1495. The *books of a corporation* are, at common law,¹⁰ regarded as, to a certain extent, public, with respect to its members, but private with respect to strangers. Thus on the application of a *member*, the King’s Bench Division will, in general, grant a rule for a limited inspection of the documents of the corporation,¹¹ if it be shown that such inspection is requisite with reference either to an action then instituted, or at

¹ *Crew v. Saunders*, 1734-5, 2 Str. 1005; *R. v. Shelley*, 1789, 3 T. R. 142 (Buller, J.).

² *R. v. Merch. Tailors’ Co.*, 1831, 2 B. & Ad. 128.

³ *R. v. Tower*, 1815, 4 M. & Selw. 162; *R. v. Lucas*, 1808, 10 East, 235.

⁴ R. S. C. 1883, Ord. XXXI. r. 19.

⁵ *R. v. Lucas*, 1808, 10 East, 235.

⁶ *Ex parte Hutt*, 1839, 7 Dowl. 690.

⁷ *Ex parte Barnes*, 1842, 2 Dowl. N. S. 20.

⁸ *Addington v. Clode*, 1774-5, 2

Wm. Bl. 1030; *Hobson v. Parker*, 1753-4, Barnes, 237, cited by Buller, J., 1789, in 3 T. R. 142; *Warrick v. Queen’s Coll.*, Oxford, 1867, L. R. 6 Ch. 732. But see *Owen v. Wynn*, 1878, 9 Ch. D. 29 (C. A.).

⁹ *R. v. Allgood*, 1798, 7 T. R. 746. But see *R. v. Lucas*, 1808, 10 East, 235, and *R. v. Tower*, 1815.

¹⁰ As to the stat. law which provides for the inspection of certain books and accounts kept by corporations, see post, § 1504-21, n.

¹¹ *R. v. Beverley*, 1839, 8 Dowl. 140.

least to some specific dispute or question depending, in which the applicant is interested; ¹ but, even in this case, the inspection will be granted to such an extent only as may be necessary for the particular occasion.² The rule was formerly sometimes laid down more broadly, and the language ascribed to the court in one or two cases, might almost lead to the inference, that members of a corporation have an absolute right, whenever they think fit, to inspect all papers belonging to the aggregate body.³ But any such doctrine is now exploded; and the privilege of inspection is confined to cases where the member of the corporation has in view some definite right or object of his own, and to those documents which would tend to illustrate such right or object.⁴ Thus, where certain members of a corporation applied for a mandamus to the master and wardens to allow them inspection of all the documents of a corporation, alleging their belief that its affairs were improperly conducted, and complaining of misgovernment in some particulars not affecting themselves, nor then in dispute, it was held that the applicants had no right on these speculative grounds to the inspection prayed;⁵ parties sued by an incorporated company for alleged misconduct, while directors, by having made false entries in the books of the corporation, were held not entitled to a general inspection of the company's books, at least without an affidavit that such inspection was necessary for their defence;⁶ and where a shareholder, sued for calls, applied to inspect the minute-books of the company, and of the meetings of the directors, "particularly with respect to the calls" in question, the application was rejected, as it appeared to have been made for the purpose, not of assisting the defendant to set up any specific defence, but of enabling him to fish out one if he could.⁷

§ 1496. The right of inspection enjoyed by members of a

§§ 1495,
1496.

¹ *R. v. Merchant Tailors' Co.*, 1831, 2 B. & Ad. 128; *In re Burton and the Saddlers' Co.*, 1862, 31 L. J. Q. B. 62.

² *Id.*

³ *R. v. Hostmen of Newcastle*, 1744-5, 2 Str. 1223; *R. v. Babb*, 1790, 3 T. R. 581.

⁴ *R. v. Merch. Tailors' Co.*, 1831,

2 B. & Ad. 128.

⁵ *R. v. Merchant Tailors' Co.*, 1831, 2 B. & Ad. 128.

⁶ *Imperial Gas Co. v. Clarke*, 1830, 7 Bing. 95.

⁷ *Birming. Brist. & Thames Junc. Rail. Co. v. White*, 1841, 10 L. J. Q. B. 121.

§§ 1496,
1497.

corporation being thus limited, it is justly still more restricted in the case of *persons who are not members*. Accordingly at common law,¹ a stranger has no right to inspect the documents of a corporation, unless they contain the common evidence of some transaction between him and the corporation, or at least furnish the rule by which he is sought to be bound, even though he be a defendant in a suit brought by the corporation. Accordingly, in an action by a corporation against a stranger for tolls, the defendant cannot be granted inspection of the corporation muniments,² but in an action by it against a party residing in a borough for the breach of a by-law restraining persons, not freemen, from exercising trades within the limits, the corporation will be ordered to grant inspection of such by-law, because it must be taken to have been made for the public weal, and for the rule and government of persons dwelling within the borough.³

§ 1497. The rules with regard to the inspection of *parish books* are regulated by the same principles as those which govern corporation books. In other words, strangers and non-parishioners have no right of access to or inspection of such books at all, and, in strictness, even a man who himself denies that he is a parishioner, although he is alleged by the parish to be one, is not entitled to see parish books,⁴ and the inhabitants of a county are not, as such, entitled to see the books of a *parish*.⁵ But *parishioners* have a qualified right to inspect the parish books for ordinary parochial purposes, such as when a dispute is pending as to the validity of a rate.⁶ But even a parishioner has no right to inspect parish books for private purposes—as, for instance, to enable him to plead a justification for libel;⁷ or to support his claim to an estate lying in the parish;⁸ or dispute the

¹ For certain statutory exceptions in the case of companies, see post, § 1504-21, *n*.

² *May. of Southampton v. Graves*, 1800, 8 T. R. 590; overruling *May. of Lynn v. Denton*, 1787, 1 T. R. 689; and *Barnstaple v. Lathey*, 1789, 3 T. R. 303; *Bolton v. Corp. of Liverpool*, 1831, 1 Myl. & K. 88, recognised in *Nias v. North and East. Rail. Co.*, 1838, 7 L. J. Ch. 142.

³ *Harrison v. Williams*, 1824, 3

B. & C. 162.

⁴ *Burrell v. Nicholson*, 1832, 1 Myl. & K. 680.

⁵ *R. v. Buckingham JJ.*, 1828, 8 B. & C. 375.

⁶ *Newell v. Simpkin*, 1830, 6 Bing. 565.

⁷ *May v. Gwynne*, 1821, 4 B. & Ald. 301.

⁸ *R. v. Smallpiece*, 1821, 2 Chitty B. 288.

appointment of a parish officer.¹ In some old cases,² in which persons were held not to be at common law entitled to inspect books, they were, however, entitled, *as litigants*, to see them by the ordinary process of discovery in the course of litigation pending between them and the parish.³

§§ 1497,
1498-99.

§§ 1498—99. The right to an inspection of various other books is regulated by principles similar to those which govern the right to inspect parish books. On the one hand, strangers—that is, persons whose property is not referred to in the entries in the books which it is sought to inspect, and who have no interest in such books—have no right of access to them or inspection of them.⁴ Thus, for instance, a party who had brought a “*qui tam*” action against a postmaster for interfering in the election of a member of Parliament, was, in the old days, possessed of no right to inspect the books of the Post Office, inasmuch as the action was not in relation to any transaction recorded in the books, and the applicant had no interest in them;⁴ and a person had no right to inspect the books of the College of Physicians unless he was a member of it.⁵ On the other hand, persons whose property is referred to in entries therein, or who otherwise have an interest in them, are entitled to inspect the books containing such entries. For instance, persons assessed to a sewers rate have a right to inspect entries and proceedings in the books kept by the Commissioners of Sewers, which refer to a rate to which they are themselves assessed or to a “level” on which they have property;⁶ a prebendary has a right to inspect at all reasonable times such of the charters statutes, injunctions, and acts of the chapter as relate to his rights concerning his prebend;⁷ all persons claiming rights of

¹ *R. v. Harrison*, 1846, 2 New Sess. Cas. 490.

² *Burrell v. Nicholson*, 1832, 1 Myl. & K. 680, is a good instance. See next note.

³ *Id.*, 1833, 1 M. & Rob. 306. It would appear that *R. v. JJ. of Buckingham*, 1828, 8 B. & C. 375, cited in note ⁶ to p. 1090, would now fall within the same principle. In such cases, the rules of Equity as to discovery now prevail. See “The Judicature Act, 1873” (36 & 37 V.

c. 66), § 25, sub-sect. 11.

⁴ *Crew v. Saunders*, 1734-5, 2 Str. 1005. See, also, *Atherfold v. Beard*, 1788, 2 T. R. 610; *Benson v. Post*, 1748, 1 Wils. 240; and *supra*, § 1497.

⁵ *R. v. Dr. West*, undated, cited 1 Wils. 240.

⁶ *R. v. Commrs. of Sewers for Tower Hamlets*, 1842, 13 L. J. Q. B. 12.

⁷ *Young v. Lynch*, 1747, 1 W. Bl. 27.

**§§ 1499,
1500.**

presentation to livings in the diocese are entitled to inspect the bishop's register of presentations and institutions kept for such diocese;¹ fundholders are entitled to inspect and take copies of entries in the deposit and transfer books of the Bank of England which relate to the stock in which they claim an interest;² other stockholders have similar rights;³ merchants can demand access to such Custom House books as contain entries relating to their goods;⁴ and persons engaged in contesting a disputed claim are, as of right, entitled to an inspection of entries in books, &c., which are common evidence of transaction between public offices and private individuals.⁵ But even in such cases the inspection will not be granted when it is merely sought for some private object.⁶

§ 1500. In accordance with the invariable rule which protects a witness or party from being compelled to furnish evidence, which may expose him to a criminal charge,⁷ the court will never oblige a person to allow the inspection⁸ of either public or private documents in his custody, where the inspection is sought for the purpose of *supporting a prosecution against himself*.⁹ But an information in the nature of a *quo warranto*,¹⁰ or a *mandamus*, the object of which is to enforce a civil right, are not regarded as criminal proceedings for the purposes of this rule.¹¹ On an *indictment* against the lord of a manor for not repairing *ratione*

¹ *R. v. Bishop of Ely*, 1828, 8 B. & C. 112.

² See *Foster v. Bank of England*, 1846, 15 L. J. Q. B. 212.

³ As to the stock of the old East India Company, see *Geary v. Hopkins*, 1702, 2 Ld. Raym. 851; and as to Colonial stock, see "The Colonial Stock Act, 1877" (40 & 41 V. c. 59), §§ 1, 18.

⁴ *Crew v. Saunders*, 1734-5, 2 Str. 1005.

⁵ See note by Nolan to *R. v. Hostmen of Newcastle*, 1744-5, 2 Str. 1223, collecting and classifying all the old authorities on the subject; and also *R. v. King*, 1788, 2 T. R. 235, collecting the cases as to assessments to the land tax.

⁶ See *Crew v. Saunders* and other cases cited in first note to this section.

⁷ Ante, § 1453.

⁸ The order respecting discovery and inspection in the R. S. C. 1883, viz., Ord. XXXI., does not affect either criminal proceedings, or proceedings on the Crown or Revenue sides of the Queen's Bench Division. See Ord. LXVIII.

⁹ Wigr. Disc. §§ 130-132, 268-270, 285, et seq.; Ld. Montague v. Dudman, 1751, 2 Ves. sen. 397; *Glyn v. Houston*, 1836, 6 L. J. Ch. 129; *R. v. Purnell*, 1748-9, 1 W. Bl. 37; *R. v. Heydon*, 1762, 1 W. Bl. 351; *R. v. Buckingham JJ.*, 1828, 8 B. & C. 375; *R. v. Cornelius*, 1743-4, 2 Str. 1210. See *Bradshaw v. Murphy*, 1836, 7 C. & P. 612.

¹⁰ *R. v. Shelley*, 1789, 3 T. R. 142; *R. v. Babb*, 1790, 3 T. R. 581; *R. v. Purnell*, 1748-9, 1 W. Bl. 37.

¹¹ *R. v. Ambergate, &c. Rail Co.*, 1852, 17 Q. B. 957.

tenuræ, it, however, has been in vain urged in support of a rule to inspect the Court rolls, that the indictment, though in form a criminal proceeding, was really to try the right of repair, which was a civil right.¹

§ 1501. Where writs, or other proceedings in a cause, are officially in the custody of an officer of the court, he probably can be compelled to permit them to be inspected for the purpose of furnishing evidence in a civil action against himself, though on this point the old King's Bench and Common Pleas came to opposite conclusions in actions against the governor of Holloway prison for a debtor's escape.²

§ 1502. In all cases where the interference of a court is required in order to obtain the inspection of a document, it must appear by affidavit that an express *demand* to inspect has been made to the proper quarter, and has been distinctly *refused*.³ This demand must, moreover, come either directly from the applicant or indirectly from his agent, and a demand by a person whom the agent has employed for that purpose will not suffice.⁴ To constitute a distinct refusal, it is not necessary that the word "refuse" or any equivalent expression should be employed, but it will be enough if the party applied to shows clearly by his conduct that he is determined not to do what is required.⁵ Still, nothing short of this will suffice.⁶ It is questionable whether the court will interfere where, on the application of a party to inspect books, liberty to do so is *offered as a favour*, though not

¹ R. v. E. Cadogan, 1822, 5 B. & Ald. 902.

² Fox v. Jones, 1828, 7 B. & C. 732; Davies v. Brown, 1824, 9 Moore, C. P. 778. See, also, R. v. Sheriff of Chester, 1819, 1 Chitty R. 477.

³ R. v. Wilts. & Berks. Can. Co., 1835, 3 A. & E. 47; R. v. Bristol & Exeter Rail. Co., 1843, 12 L. J. Q. B. 106. See, also, R. v. Thompson, 1845, 6 Q. B. 721; R. v. JJ. of Bodmin, 1892, 2 Q. B. 21. But the objection that the affidavits disclose no sufficient demand and refusal must be taken before the merits are discussed, 4 Q. B. 171, 1843 (Id. Denman), recognising R.

v. East. Cos. Rail. Co., 1839, 10 A. & E. 531.

⁴ Ex parte Hutt, 1839, 7 Dowl. 690.

⁵ R. v. Brecknock & Aberg. Can. Co., 1835, 3 A. & E. 222.

⁶ R. v. Wilts. & Berks. Can. Co., 1835, 3 A. & E. 47. Where, however, a party applied at chambers for leave to inspect certain books, but the judge, after hearing both parties, referred the question to the court, it seems to have been considered that the proceedings at chambers were equivalent to a demand and refusal: Birming., &c. Rail. Co. v. White, 1841, 10 L. J. Q. B. 121.

§§ 1502—*as a right*, and is consequently declined by the applicant,¹ but it is submitted that it ought to do so, since *the right* is denied.

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§ 1503. The preceding observations have been confined to cases where the right of inspection depends upon the common law.

§§ 1504-21. But rights of inspection also exist under numerous statutes, which especially provide for the keeping of particular public documents, and for their inspection by parties interested.²

¹ *R. v. Trust. of Northleach, &c. Roads*, 1834, 3 A. & E. 477 (Ld. Denman).

² Some of the more important matters, as to which rights of inspection are conferred by statute, mentioned in alphabetical order, are as follow:—“*The Ballot Act*, 1872” (35 & 36 V. c. 33), 1st Sched. 1st Part, r. 42, provides that all documents forwarded by the returning officer to the Clerk of the Crown in Chancery (that is, it is presumed, to the Crown Office Department of the Central Office), other than ballot papers and counterfoils, are to be open to public inspection at such time and under such regulations as the Clerk, with the consent of the Speaker, may prescribe; and the Clerk is also to supply copies or extracts to any person on the payment of such fees as the Treasury may sanction. *Burmote Courts*: see *High Peak Mining Customs and Mineral Courts Act*. “*The Baths and Washhouses Acts*, 1846” (9 & 10 V. c. 74; 9 & 10 V. c. 87, § 5, Ir.), enact that the books of accounts which the commissioners of public baths are thereby directed to keep may be examined and copied gratis by any commissioner, churchwarden, overseer, or ratepayer of the parish in which the baths are established. See similar clauses as to the metropolis in 18 & 19 V. c. 120, §§ 61, 198, 199. As to *Births, Baptisms, Marriages, Deaths or Burials Registers* various rights of inspection exist—Thus, “*The Births and Deaths Registration Act*, 1836” (6 & 7 W. 4, c. 86), which has been amended by “*The Births and Deaths Registration Act*, 1874” (37 & 38 V. c. 88), by § 35 enacts, that “every rector, vicar, or curate, and every registrar, registering officer, and secretary, who shall have the keep-

ing for the time being of any register-book of births, deaths, or marriages, shall at all reasonable times allow searches to be made of any register-book in his keeping.” [This will include register-books of baptisms and burials, which the rector, vicar, or curate of each parish is bound to keep, under the provisions of 52 G. 3, c. 146, § 5.] “And shall give a copy certified under his hand of any entry or entries in the same, on payment of the fee hereinafter mentioned; (that is to say,) for every search extending over a period not more than one year, the sum of one shilling, and sixpence additional for every additional year, and the sum of two shillings and sixpence for every single certificate.” By § 32 of “*The Births and Deaths Registration Act*, 1874” (37 & 38 V. c. 88), every superintendent registrar is to make indexes of the register-books in his offices; and “every person shall be entitled at all reasonable hours to search the said indexes, and to have a certified copy of any entry or entries in the said register-books under the hand of the superintendent registrar, on payment in each case of the appointed fee:”—that is, as explained in the 2nd Sched., for a general search, five shillings; for a particular search, one shilling; for a certified copy, two shillings and sixpence. “*The Births and Deaths Registration Act*, 1836” (6 & 7 W. 4, c. 86), § 37, enacts, that “the registrar-general shall cause indexes of all the said certified copies of the registers to be made, and kept in the general register office; and that every person shall be entitled, on payment of the fees hereinafter mentioned, to search the said indexes between the hours of ten in the morning

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and four in the afternoon of every day, except Sundays, Christmas-day, and Good Friday, and to have a certified copy of any entry in the said certified copies of the registers; and for every general search of the said indexes shall be paid the sum of twenty shillings, and for every particular search the sum of one shilling; and for every such certified copy the sum of two shillings and sixpence, and no more, shall be paid to the registrar-general, or such other officer as shall be appointed for that purpose on his account." These certificates are made evidence by the provisions set out post (sub tit., "*Certified Extracts*"), § 1611, n. The act for registering marriages, and also the Act for registering births and deaths, in Ireland, respectively contain similar provisions. See 7 & 8 V. c. 81, §§ 68—70, Ir., and 26 & 27 V. c. 11, §§ 50—52, Ir. See, also, 32 G. 3, c. 146, § 5. Similar provisions to the above are contained in "The Burial Act, 1853" (16 & 17 V. c. 134), § 8, and "The Registration of Burials Act, 1864" (27 & 28 V. c. 97), § 6, with respect to searches to be made in, and copies and extracts to be taken from, the registers of burials respectively kept under the directions of "The Metropolitan Interment Act" (15 & 16 V. c. 87), and of those Acts. "The Marriage Act, 1836" (6 & 7 W. 4, c. 85), § 5, enacts, that the "marriage notice-book," which the superintendent registrar is bound to keep, shall be "open at all reasonable times without fee to all persons desirous of inspecting the same" (as to marriages in Ireland, see "The Marriages (Ireland) Act, 1844" (7 & 8 V. c. 81, Ir.), §§ 2, 14, and "The Marriage Law (Ireland) Amendment Act, 1863" (26 & 27 V. c. 27, Ir.), §§ 2, 3). The Act of 3 & 4 V. c. 92, and "The Births and Deaths Registration Act, 1858" (21 & 22 V. c. 25), provide for the deposit of certain non-parochial registers in the custody of the registrar-general. These registers consist of more than seven thousand books, belonging to one or other of the following religious communities:—The foreign Protestant churches in England; the Quakers;

the Presbyterians; the Independents; the Baptists; the Wesleyan Methodists, in their several branches; the Moravians; the Countess of Huntingdon's connexion; the Calvinistic Methodists, and the Swedenborgians. Besides these, a few registers have been deposited, which belong either to Roman Catholic, Irvingite, Inghamite, Bible Christian, New Jerusalemite, Unitarian, or Scotch Church congregations. The registers transmitted from the foreign Protestant churches contain entries of births, baptisms, marriages, deaths, and burials; and those sent by the Quakers are registers of births, marriages, and deaths. The remaining books are for the most part registers of births or baptisms, but there are some registers of deaths or burials, and one or two registers of marriages. The dates of these books range from the middle of the 16th century to the year 1840. Most of the registers were sent to the registrar-general from the minister of the congregation to which they belonged, but a valuable collection of these documents was transmitted from Dr. Williams' library, in Redcross Street, and another smaller one from the Wesleyan Registry in Paternoster Row. It may be observed, that the Jews have declined to part with their registers, as have also the Roman Catholic prelates, in most instances. The registers, too, of births and deaths, which are kept at the Herald's College, from the year 1747 to 1783; the records of Indian baptisms, deaths, and marriages, deposited at the office of the Secretary for India; and the registers of births, baptisms, marriages, and burials of British subjects abroad, transmitted to the registry of the Consistory Court of London, are excluded from the operation of the Act. See Report of Commissioners appointed to inquire into the state, &c., of non-parochial registers, which was presented to Parliament in 1838; and another Report of the Commissioners bearing date 31st December, 1857. A list of the non-parochial registers in the custody of the registrar-general was published in 1841, and contains a statement—1, of the number marked on each register; 2, of the

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name of the place of worship; 3, of the denomination and date of the foundation; 4, of the name of the last minister; 5, of the number of the books deposited, and the nature of the entries; and, 6, of the period over which each register extends. Copies of this list have been sent to every person, congregation, or society, having had the custody of any of the deposited registers, as also to every superintendent registrar, and to the registrar-general, to be open for inspection at the respective offices, without fee. A list of the registers deposited under 21 & 22 V. c. 25, is given in App. A. to the Report of the Commissioners dated 31st December, 1857. Under § 5 of 3 & 4 V. c. 92, every person is entitled on payment of certain fees, but upon personal application only (see fly-sheet to "Lists of Non-Parochial Registers," published by the registrar-general pursuant to the Act of 1841), to inspect these registers and the lists of the same, and to have certified copies of such entries as he may require. A similar law prevails with respect to the register of marriages in the Ionian Islands, which is now, under 27 & 28 V. c. 77, § 9, deposited with the registrar-general.

Borough Accounts and Documents.—See *Municipal Corporations. Charity trustees.*—Under "The Charitable Trusts Acts, 1853 and 1855 (16 & 17 V. c. 137, § 61, and 18 & 19 V. c. 124, § 44), the annual accounts of trustees of charities, which are now either deposited at the office of the Charity Commissioners or inserted in the books of the local vestries, are open to inspection by all persons at all reasonable hours, subject to the regulations of the Commissioners; and any person may, on payment of a trifling sum, require a copy of any such account or of any part thereof. "The Commissioners Clauses Act, 1847" (10 & 11 V. c. 16), contains, in §§ 31, 55, 76, 88—90, somewhat similar provisions to those below mentioned under head "Companies" as contained in "The Companies Clauses Consolidation Act." *Companies.*—Under "The Companies Act, 1862" (25 & 26 V. c. 89), § 174, r. 5, any person may inspect, and require a certified copy or extract of,

any document which is kept by the registrar of joint-stock companies (see *R. v. Mariquita and New Granada Min. Co.*, 1838, 28 L. J. Q. B. 67); and by § 32, every member of a company duly registered under that Act is entitled, during business hours, but subject to such reasonable restrictions as the company in general meeting may impose, to inspect gratis the register of members which is kept at the registered office of the company. Strangers have a similar right on payment of a small fee, and they, as well as members, can obtain a copy of any part of the register on paying sixpence for every hundred words copied. This provision, however, does not apply to the case of a company in liquidation (see *Re Kent Coal Fields Syndicate, Ltd.*, [1898] 1 Q. B. 754), nor does it entitle the person inspecting to himself take extracts from or make copies of the entries in the register (see *Re Balaghât Gold Mining Co., Ltd.*, [1901] 2 K. B. 665). So, "The Companies Clauses Consolidation Act, 1845 (8 & 9 V. c. 16), which applies to every joint-stock company incorporated by statute since the 8th of May, 1845, for the purpose of carrying on any undertaking, by § 10, requires such company to keep a book, called "The Shareholders' Address Book," in which are to be entered in alphabetical order the names and addresses of all the shareholders. By § 45, a register is to be kept in which are to be entered particulars of all mortgages and bonds. § 63 requires the company to cause the names of the parties interested in the general capital stock of the company, with the amount of the interest possessed by them respectively, to be entered in the book, to be called the "Register of Holders of Consolidated Stock." §§ 115—119 provide for the accounts of the company to be kept, and to be balanced at certain periods, and to be open for inspection at those periods, or else for fourteen days before and a month after each ordinary general meeting; and the above-mentioned sections also provide for the inspection by shareholders and other persons interested of the books therein respectively required to be kept, and for the

taking of copies thereof. See *R. v. London and St. Katharine Dock Co.*, 1874, 44 L. J. Q. B. 4. Under "The Companies Clauses Act," under various Consolidation Acts passed in 1847, under "The Railways Companies Securities Act, 1866," and under "The Metropolis Water Act, 1871," various rights of inspection and of demanding copies, are likewise conferred (as to which see those several titles. "*The Copyright Amendment Act, 1842*" (5 & 6 V. c. 45), § 11, provides,—and the provision is incorporated in "*The International Copyright Act, 1844*" (7 & 8 V. c. 12), § 8, and in "*The Fine Arts Copyright Act, 1862*" (25 & 26 V. c. 68), §§ 4, 5,—that a register of the proprietorship of copyright, and of the assignments thereof, shall be kept at the Hall of the Stationers' Company, and shall, at all convenient times, be open to the inspection of any person, on payment of one shilling for every entry inspected; and any person may, on payment of five shillings, obtain a certified copy of any entry: see *Lucas v. Cooke*, 1880, 13 Ch. D. 872. *Deposits under Standing Orders of Parliament*: see title "*Parliamentary Documents Deposit Act*." Under "*The Elementary Education Act, 1870*" (33 & 34 V. c. 75), § 87, "every ratepayer in a school district may, at all reasonable times, without payment, inspect and take copies of, or extracts from, all books and documents belonging to or under the control of the school board of such district." "*The Friendly Societies Act, 1896*" (59 & 60 V. c. 25), § 40, enables a member or person having an interest in the funds of a registered society or branch to inspect the books at all reasonable hours, but does not empower one member to inspect the loan account of any other member without his written consent. "*The Gasworks Clauses Act, 1847*" (10 & 11 V. c. 15), § 38, and "*The Harbours, Docks, and Piers Clauses Act, 1847*" (id. c. 27), § 50, also contain provisions authorising parties interested to inspect and demand copies of the books and documents relating to the company's affairs. Under "*The High Peak Mining Customs and Mineral Courts Act, 1851*" (14 & 15

V. c. 94), § 45, facilities are given for all persons to search and examine documents in the custody of the steward of the Barmote Court, under that Act. "*The Highway Act, 1835*" (5 & 6 W. 4, c. 50), § 40, directs that the surveyors keep books of account, and that these books be open at all seasonable times to the inspection of all inhabitants rated to the highway rate of the parish or district, and that they be also entitled to take copies or extracts from them without fee. See, also, title "*Turnpike*." *Jurors' Lists*—Under "*The Juries Act, 1825*" (6 G. 4, c. 50), § 9, the churchwardens and overseers of every parish are directed to make out a list of every person qualified to serve on juries, and to allow such list to be perused gratis by any inhabitant, at all reasonable times during the first three weeks of September; while "*The Common Law Procedure Act, 1851*" (15 & 16 V. c. 76, §§ 106—108: see, also, 6 G. 4, c. 50, § 19), enacts, that a printed panel of the jurors summoned, whether common or special, shall, seven days at least before the sitting of every court, be kept at the sheriff's office for public inspection; and that a printed copy of such panel shall be delivered by the sheriff to any party requiring it, on payment of one shilling. As to the practice in Ireland, see "*The Juries Act (Ireland), 1871*" (34 & 35 V. c. 65, Ir.), §§ 12, 18. "*The Land Transfer Act, 1875*" (38 & 39 V. c. 107), § 104, enables any registered proprietor of any land or charge, and any person authorised by him, or by an order of the court, or by general rule, but no other person, to, subject to the regulations in force, inspect and make copies of, and extracts from, any register or document in the custody of the registrar relating to such land or charge. Subject, also, to such regulation as may be made by the Treasury, every person has, under 13 & 14 V. c. 72, § 52, Ir., a right to search any of the indexes kept at the office for the registration of assurances of lands in Ireland. *Local Loans*—The registers which are kept under "*The Local Loans Act, 1875*" (38 & 39 V. c. 83), § 24, provides that the registers of "nominal securities" may be in-

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spected at all reasonable times upon payment of the prescribed fee. "*The Markets and Fairs Clauses Act, 1847*" (10 & 11 V. c. 14), § 50, also enables parties interested to inspect and demand copies of books and documents relating to the undertaking: "*London County Council*, see post, §§ 1596-7, n., and infra, "*The Metropolis Management Act*," "*The Merchant Shipping Act, 1894*" (57 & 58 V. c. 60), provides, that any person may, upon payment of a reasonable fee, inspect the register-book kept by any registrar of British ships (§ 64 (1)), as also any of the documents recorded by the registrar-general of shipping and seamen: § 256 (1). "*The Metropolis Management Act, 1855*" (18 & 19 V. c. 120), also contains, in §§ 61, 198, and 199, provisions as to inspecting and taking copies of books and other documents kept under that Act. "*The Metropolis Water Act, 1871*" (34 & 35 V. c. 113), §§ 23, 37, also enables parties interested to inspect and demand copies of the books and documents of the company. By "*The Metropolis Water Act, 1902*" (2 Ed. 7, c. 41), the rights, powers, duties, and obligations of the various Companies are now transferred to the Metropolitan Water Board. Under "*The Mortgage Debenture (Amendment) Act, 1870*" (33 & 34 V. c. 20), § 11, on payment of the prescribed fees, "any person may inspect, and make copies of, and extracts from, the register of securities, the register of mortgage debentures, and the returns made by the company to the registrar," under "*The Mortgage Debenture Act, 1865*" (28 & 29 V. c. 78). Again, "*The Municipal Corporations Act, 1882*" (45 & 46 V. c. 50), contains, in § 233, the following special provisions relating to the inspection and copying of documents:—“(1.) The minutes of proceedings of the council shall be open to the inspection of a burgess on payment of a fee of one shilling, and a burgess may make a copy thereof or take an extract therefrom. (2.) A burgess may make a copy of, or take an extract from, an order of the council for the payment of money. (3.) The treasurer's accounts shall be open to the inspection of the

council, and a member of the council may make a copy thereof, or take an extract therefrom. (4.) The abstract of the treasurer's accounts shall be open to the inspection of all the ratepayers of the borough, and copies thereof shall be delivered to a ratepayer on payment of a reasonable price for each copy. (5.) The Freeman's Roll shall be open to public inspection, and the town clerk shall deliver copies thereof to any person on payment of a reasonable price for each copy.” *Newspaper Proprietors*.—Under "*The Newspaper Libel and Registration Act, 1881*" (44 & 45 V. c. 60), § 13, all persons are at liberty to search and inspect the book called "*The Register of Newspaper Proprietors*," which is kept by the registrar of joint stock companies, and to demand certified copies of any such entry. *Nominal Securities*: see "*Local Loans*," "*The Parliamentary and Municipal Registration Act, 1878*": see "*Poor Rate*." "*The Parliamentary Documents Deposit Act, 1837*" (7 W. 4 & 1 V. c. 83), § 1, requires clerks of the peace, town-clerks, and other persons holding official situations to take custody of all maps, plans, sections, books, and writings, which, by the standing orders of either House of Parliament, are directed to be deposited with them previous to the introduction of any railway bill, or other bill of a like nature; and the same statute enacts, in § 2, that all persons interested shall have liberty to inspect, and take copies of, or extracts from, these documents, on payment of certain regulated fees. The provisions of this Act have been extended by several consolidation and other Acts to the maps, plans, and sections of other undertakings, and to the maps, plans, and sections of alterations proposed to be made therein [see "*The Railways Clauses Consolidation Act, 1845*" (8 & 9 V. c. 20), § 9; do. for Scotland, id. c. 33, § 9; "*The Waterworks Clauses Act, 1847*" (10 & 11 V. c. 17, § 21); as also to copies of the Special Acts, by which particular companies, commissioners, or other undertakers have been authorised to act. (See "*The Companies Clauses Consolidation Act*" (8 & 9 V. c. 16), § 161; do. for

Scotland, id. c. 17, § 165; "The Lands Clauses Consolidation Act," id. c. 18, § 150; do. for Scotland, id. c. 19, § 142; "The Railways Clauses Consolidation Act," id. c. 20, § 162; do. for Scotland, id. c. 33, § 153; "The Markets and Fairs Clauses Act" (10 & 11 V. c. 14), § 58; "The Gasworks Clauses Act," id. c. 15, § 45; "The Commissioners Clauses Act," id. c. 16, § 110; "The Waterworks Clauses Act," id. c. 17, § 90; "The Harbours, Docks, and Piers Clauses Act," id. c. 27, § 97; "The Towns Improvement Clauses Act," id. c. 34, § 214; "The Cemeteries Clauses Act," c. 65, § 66; and "The Town Police Clauses Act," id. c. 89, § 77. See 9 & 10 V. c. 39, § 6. See, also, 9 & 10 V. c. 3, § 13, as to plans, &c., of harbours, and other works in Ireland, constructed by commissioners to encourage sea fisheries.] *Parliamentary Voters*.—Under "The Parliamentary Voters Registration Act, 1843" (6 & 7 V. c. 18) [as to the law in Ireland, see 13 & 14 V. c. 69], §§ 5, 8, 13, 14, 18 and 20, every person may, during the fortnight next after publication, inspect gratis the lists of claimants, the register of voters, and the lists of persons objected to, which are made out by the overseers and town-clerks respectively, and obtain copies thereof on payment of a small sum. So under § 49 of the same Act, any person may, at a stipulated price, purchase copies of the revised registers; and under § 16 of the Act, every registered elector and claimant may, between the 10th and 31st August, without payment, inspect and take extracts from any poor-rate book, for any purpose relating to any claim or objection, made or intended to be made, by or against him. More extensive rights of inspecting and making copies of poor-rates are by "The Parliamentary and Municipal Registration Act, 1878" (41 & 42 V. c. 26), extended to every person "who is registered as a parliamentary voter." "The Patents, Designs, and Trade Marks Act, 1883" (46 & 47 V. c. 57), § 88, requires every register, whether of patents, or of designs, or of trade marks, which is kept in the Patent Office, to, at all "convenient times, be open

to the inspection of the public, subject to such regulations as may be prescribed (see Patents Rules, 1883, r. 75, and Sched. I. r. 32, cited in 53 L. J. Ord. and Rules, 86, 89); and certified copies, sealed with the seal of the Patent Office, of any entry in any such register shall be given to any person requiring the same, on payment of the prescribed fee" (46 & 47 V. c. 57, § 88); but by § 52, the right of inspecting registered designs is limited. The Patents Rules, 1883, further provide by r. 76, that "certified copies of, or extracts from, patents, specifications, disclaimers, affidavits, statutory declarations, and other public documents in the Patent Office, or of or from registers or other books kept there, may be furnished by the comptroller on payment of the prescribed fee." See as to the fees, Sched. I. rr. 33, 34, 35. *Poor Law rates and rules* may be inspected under the following statutes. Under "The Poor Law Amendment Act, 1834" (4 & 5 W. 4, c. 76, § 18); [see, also, "The Poor Law Board Act, 1847" (10 & 11 V. c. 109), §§ 10, 29; "The Local Government Board Act, 1871" (34 & 35 V. c. 70)], every owner of property or his agent, and every ratepayer, is entitled to inspect gratis the rules sent by the late Poor Law Board, or the present Local Government Board, to the overseers of his parish, or to the guardians of his union, as also to take copies of such rules, or to require copies to be furnished to him, on payment of a trifling charge. Under "The Poor Law Amendment Act, 1844" (7 & 8 V. c. 101), § 33, for seven days before the auditing of the overseer's accounts, their rate-books are open, between the hours of eleven and three, for the inspection of every person liable to be rated to the relief of the poor. [See, also, "The Poor Rate Act, 1743" (17 G. 2, c. 3), § 3; 6 & 7 W. 4, c. 96, § 5; *Tennant v. Overton*, 1846, 15 L. J. M. C. 105; *Tennant v. Bell*, 1846, 16 L. J. M. C. 31.] Moreover, under certain circumstances defined therein, burgesses have a right under "The Parliamentary and Municipal Registration Act, 1878" (41 & 42 V. c. 26), § 13, to inspect and make copies free of charge from the books containing the poor

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§ 1522. When the public are entitled by law to inspect any register kept in pursuance of any Act of Parliament, the publication of a mere copy of it is privileged.¹

rates: see, also, title, "*Parliamentary Voters*." As to returns by railway companies for the purposes of poor law assessments, see "*The Railway Clauses Consolidation Act*," *infra*. *Public Baths*: see *Baths*. *Public Health, Rates, Mortgages of Rates, and Registers of Voters*.—Under "*The Public Health Act, 1875*" (38 & 39 V. c. 55), § 219, "any person interested in or assessed to any rate" made under that Act, "may inspect the same, and any estimate made previous thereto, and may take copies of or extracts therefrom, without fee or reward." Under § 237 of the same Act, all registers of mortgages on rates, kept at the offices of the local authorities, "shall be open to public inspection during office hours without fee or reward." And by Sched. 2, r. 1, sub-r. 30, of the same Act, the register of voters is also open to a limited inspection. "*The Railway Clauses Consolidation Act*" (3 & 9 V. c. 20),—which applies to all railways authorised to be constructed since the 8th of May, 1845,—contains also an important provision on this subject, for it enacts, in § 107, that every railway company subject to that Act shall, if required, transmit a copy of its annual account of disbursements and receipts, duly audited, and free of charge, to the overseers of the poor of the several parishes, and to the clerks of the peace of the counties, through which the railway shall pass; and such accounts shall be open to the inspection of the public at all reasonable hours, on payment of one shilling. An easy mode is thus afforded of ascertaining the sum at which the company should be assessed to the parochial and county rates. "*The Railway Companies Securities Act, 1866*" (29 & 30 V. c. 108), also contains, in §§ 7—9 and 12, provisions authorising parties interested to inspect and demand copies of the books and accounts required to be kept by the Act. *Rating of Railways*: see *The Railway Clauses Consolidation*

Act. As to *Registers of Mortgages of Rates*: see *Public Health. Register of Newspaper Proprietors*: see *Newspaper Proprietors*. As to *Registers of Voters under "The Public Health Act"*: see *Public Health. Shipping*: see *The Merchant Shipping Act*. "*The Solicitors Acts, 1843 and 1877*" (6 & 7 V. c. 73, §§ 11, 23; 40 & 41 V. c. 25, 2nd Sched., Part 2, substituted for 6 & 7 V. c. 73, § 20; see, also, 29 & 30 V. c. 84, §§ 15, 26, 29, *Ir.*), make every person entitled, without fee, to have free access to the rolls of solicitors, which are now kept by the officer appointed for that purpose under the last-named Act: to the books containing an abstract of the affidavits sworn by such solicitors as have articulated clerks, which books are placed under the same custody as the rolls; and to the books kept by the registrar, in which are entered the particulars of the declarations signed by solicitors preparatory to obtaining their certificates. "*The Turnpike Roads Acts, 1823 and 1829*" (3 G. 4, c. 126, §§ 72, 73; 9 G. 4, c. 77, § 2), require that the books containing the oaths, orders, accounts, and proceedings of the trustees, as well as those kept for registering mortgages or assignments, shall be open to be inspected and copied gratis, at all seasonable times, by the trustees, or by any creditor of the tolls; while, by the Act relating to *Turnpike Trusts in South Wales* (7 & 8 V. c. 91, § 71), similar books, kept by the County Roads Board, may be inspected and copied without fee by all members of such board, and of all district boards within the county, and by every person paying any rate by that Act authorised to be made. "*The Valuation (Metropolis) Act, 1869*" (32 & 33 V. c. 67), §§ 67—69, provides that any documents required by the Act to be deposited with the rate books of the parish, and especially all valuation lists, may be inspected and copied without charge by any ratepayer.

¹ *Searles v. Scarlett*, 1892, 2 Q. B.

§ 1523. In the SECOND PLACE, we must consider THE MODE OF PROVING PUBLIC DOCUMENTS. And, first, as to *legislative Acts*. *Public statutes* (as already seen¹) require no proof, being supposed to exist in the memories of all. Yet, for certainty of recollection, reference may, nevertheless, be had to a printed copy, and if the accuracy of such copy be questionable, the court will consult the Parliament roll.² In most *local and personal Acts* it was formerly customary to insert a clause, declaring that the Act should be deemed public, and should be judicially noticed: and this dispensed with the necessity, not only of pleading the Act specially, but of producing an examined copy, or a copy printed by the printer for the Crown.³ But the Legislature has enacted that every Act made after the commencement of the year 1851 shall be deemed a public Act, and judicially noticed as such, unless the contrary be expressly provided.⁴ Acts, whether local and personal, or merely private, which, being passed before 1851, contain no clause declaring them to be public, or which, being passed since that date, contain an express clause, declaring them not to be public, can most simply be proved by producing a copy, which *purports* to be printed by the King's printer, or under the superintendence or authority of His Majesty's Stationery Office,⁵ and they need not be proved to be so printed;⁶ but such Acts may also be proved by means of an examined copy, shown on oath to have been compared with the Parliament roll.⁷ Acts which have not been printed by any such authorised printer, (as is sometimes the case with Acts for naturalising aliens, for dissolving marriages, for inclosing lands, and other purposes of a strictly personal character), can be regularly proved by an examined copy, or a certified transcript into Chancery, if there be one.⁸

§ 1524. *Statutes passed in Ireland prior to the Union* are conclusively proved in any court of Great Britain by producing a

56 (C. A.); *Fleming v. Newton*, 1848, 1 H. L. C. 363.

¹ Ante, § 5.

² *R. v. Jeffries*, 1720-1, 1 Str. 446.

³ *Woodward v. Cotton*, 1834, 1 C. M. & R. 44; *Beaumont v. Mountain*, 1834, 10 Bing. 404. These cases explain, and partially overrule, *Brett v. Beales*, 1829, 10 B. & C. 508.

⁴ See "The Interpretation Act, 1889" (52 & 53 V. c. 63), § 9.

⁵ 45 V. c. 9 ("The Documentary Evidence Act, 1882"), § 2.

⁶ 8 & 9 V. c. 113, § 3, cited ante, § 7.

⁷ B. N. P. 225.

⁸ *Roos Barony*, 1804, Min. Ev. 145, cited Hubb. Ev. of Suc. 613.

§§ 1524—1527.— copy of them printed and published by the printer for the Crown; and the copies of statutes passed since that event, printed and published by the government printer, are similarly receivable as conclusive evidence in any court in Ireland.¹

§ 1525. The *statute or written law of any foreign nation* cannot (as we have seen) be proved in English courts by the production of a copy, however well authenticated; but it is in all cases necessary to call some person, skilled in the foreign law, to prove the existence and meaning of the statute or code on which reliance is placed.²

§ 1526. *Acts of state* may be proved in various ways, according to the nature of the document. *British treaties* may be proved, by producing either the originals, or copies exemplified under the Great Seal, or examined copies, or copies coming from the government press; but, in this last case, it may be doubtful whether the courts would be satisfied, without proof that the copy was actually printed by the printer for the Crown. *Charters, letters-patent*,³ *letters-close, grants from the Crown, pardons, and commissions*, will be most conveniently proved by the production of the originals under the Great Seal,⁴ the Privy Seal,⁵ or the Royal Sign-manual; but as these are matters of public record,⁶ they might also, as it seems, be proved by exemplifications under the Great Seal, or by examined copies. It may be noted that Letters Patent under the Great Seal, being records, are valid before enrolment, and are (both in England and Ireland) admissible in evidence without proof of an inquisition, or of a warrant or letter from the Crown directing the grant.⁷

§ 1527. *Royal Proclamations, and Orders and Regulations issued*

* ¹ 41 G. 3, c. 90 ("The Crown Debts Act, 1801"), § 9. It is presumed that this section would be satisfied by producing a copy which *purported* to be printed by the government printer, without proof that it was actually so printed. The words, however, in their strict sense, do not admit of this construction, and the evil is not remedied by "The Documentary Evidence Act" (8 & 9 V. c. 113), cited ante, § 7. See *Woodward v. Cotton*, 1834, 1 C. M. & R. 44. See, also, 45 V. c. 9, and *qu.* as to the effect, if any, produced by

that Act.

² See ante, §§ 1423—1425.

³ As to proof of patents for inventions, see post, § 1603.

⁴ See "The Great Seal Act, 1884" (47 & 48 V. c. 30); also, 40 & 41 V. c. 41.

⁵ Since 28th July, 1884, no instrument is required to be passed under the Privy Seal: 47 & 48 V. c. 30, § 3.

⁶ 2 Bl. Com. 346.

⁷ *D. of Devonshire v. Neill*, 1876-7. 2 L. R. Ir. 132, 146.

under the authority of Government, may be proved, like other public documents, by producing either the originals, or examined copies;¹ and in addition to these modes of proof, both as regards these and certain other public documents,² further facilities of proof have been afforded and defined by the Documentary Evidence Act, 1868,³ as amended by the Documentary Evidence Act, 1882,⁴ and the Documentary Evidence Act, 1895.⁵ These enactments, when read together, provide⁶ that “*Primâ facie* evidence of any proclamation, order, or regulation⁷ issued before or after the passing of this Act by His Majesty or by the Privy Council, or by the Lord Lieutenant or other chief governor or governors of Ireland, either alone or acting with the advice of the Privy Council in Ireland,⁸ also of any proclamation, order, or regulation, issued before or after the passing of this Act by or under the authority of any such department of the government or officer as is mentioned in the first column of the schedule hereto, may be given in all courts of justice, and in all legal proceedings whatsoever, in all or any of the modes hereinafter mentioned; that is to say:—

“(1.) By the production of a copy of the Gazette⁹ purporting to contain such proclamation, order, or regulation: ¹⁰

“(2.) By the production of a copy of such proclamation, order, or regulation purporting to be printed by the government printer,¹¹ or by any printer to His Majesty in

¹ As to when proof of this kind will be admissible, see, further, post, § 1662.

² See Schedule, *infra*.

³ 31 & 32 V. c. 37.

⁴ 45 V. c. 9.

⁵ 58 V. c. 9.

⁶ See § 2 of “The Documentary Evidence Act, 1868” (31 & 32 V. c. 37), and § 4 of “The Documentary Evidence Act, 1882” (45 V. c. 9).

⁷ This Act is made specially applicable to “any regulation made by a Secretary of State in pursuance of” “The Naturalisation Act, 1870” (33 & 34 V. c. 14), § 12, sub-a. 5, and to “any rule made by a Secretary of State” in pursuance of “The Prison Act, 1877” (40 & 41 V. c. 21), § 51. As to the proof of the Irish prison rules, see post, § 1663.

⁸ “Any approval of the Treasury” under “The Post Office Act, 1870,” and “any warrant of the Treasury” under “The Post Office Act, 1875,” shall be deemed an “order” within this Act: 33 & 34 V. c. 79, § 21; 38 & 39 V. c. 22, § 9.

⁹ This includes the London, the Dublin, and also the Edinburgh Gazettes. See 31 & 32 V. c. 37, § 5, cited post, *n.* to this §. See, also, 40 & 41 V. c. 41, § 3, sub-s. 3. The entire Gazette must be produced; a cutting from it will not suffice: *R. v. Lowe*, 1883, 52 L. J. M. C. 122.

¹⁰ See, also, “The Contagious Diseases (Animals) Act, 1878” (41 & 42 V. c. 74), § 58.

¹¹ *Huggins v. Ward*, 1873, 8 Q. B. D. 521.

§ 1527.

Ireland, or by any printer printing either in England or Ireland under the superintendence or authority of His Majesty's Stationery Office,¹—or, where the question arises in a court in any British colony or possession, of a copy purporting to be printed under the authority of the legislature of such British colony or possession :

- “(8.) By the production, in the case of any proclamation, order, or regulation issued by His Majesty, or by the Privy Council in England, or by the Lord Lieutenant or his Privy Council in Ireland,² of a copy or extract purporting to be certified to be true by the Clerk of the Privy Council, or by any one of the Lords or others of the Privy Council, and, in the case of any proclamation, order, or regulation issued by or under the authority of any of the said departments or officers, by the production of a copy or extract purporting to be certified to be true by the person or persons specified in the second column of the said schedule in connection with such department or officer.³

¹ 45 V. c. 9, §§ 2, 4.

² 45 V. c. 9, § 4.

³ This Schedule to “The Documentary Evidence Act, 1868” (31 & 32 V. c. 37), as altered by subsequent legislation, stands now as follows :—

COLUMN I. Name of Department or Officer.	COLUMN II. Names of Certifying Officers.
The Commissioners of the Treasury .	Any Commissioner, Secretary, or Assistant Secretary of the Treasury.
The Commissioners for executing the Office of Lord High Admiral.	Any of the Commissioners for executing the Office of Lord High Admiral, or either of the Secretaries to the said Commissioners.
Secretaries of State	Any Secretary or Under-Secretary of State.
Committee of Privy Council for Trade .	Any Member of the Committee of Privy Council for Trade, or any Secretary or Assistant Secretary of the said Committee.
The late Poor-law Board (abolished by 34 & 35 V. c. 70, § 2).	Any Commissioner of the Poor-law Board, or any Secretary or Assistant Secretary of the said Board.
The Local Government Board (34 & 35 V. c. 70, § 5. See, also, 38 & 39 V. c. 55, §§ 130, 135, 297, sub-s. 7; and 41 & 42 V. c. 52, § 265, 1r.).	Any Member of the Local Government Board, or any Secretary or Assistant Secretary of that Board.

"Any copy or extract made in pursuance of this Act may be in print or in writing, or partly in print and partly in writing. § 1527.

"No proof shall be required of the handwriting or official position of any person certifying, in pursuance of this Act, to the truth of any copy of or extract from any proclamation, order, or regulation."¹

COLUMN I.—continued. Name of Department or Officer.	COLUMN II.—continued. Names of Certifying Officers.
The Education Department (33 & 34 V. c. 75, § 83).	Any Member of the Education Department, or any Secretary or Assistant Secretary of that Department.
The Postmaster-General (33 & 34 V. c. 79, § 21. See, also, 44 & 45 V. c. 20, §§ 6 and 7; and 47 & 48 V. c. 76, § 15).	Any Secretary or Assistant Secretary of the Post Office.
A Secretary of State acting under "The Artillery and Rifle Ranges Acts, 1885" (48 & 49 V. c. 36, § 6; and 49 V. c. 5).	Any of His Majesty's Principal Secretaries of State.
The Board of Agriculture. See "The Documentary Evidence Act, 1895" (58 V. c. 9).	The President, Secretary, or any Member of the Board, or any person authorised by the President to act on behalf of the Secretary.

¹ Sect. 3 of "The Documentary Evidence Act, 1868" (31 & 32 V. c. 37), enacts, that, "subject to any law that may be from time to time made by the Legislature of any British colony or possession, this Act shall be in force in every such colony and possession."

Sect. 4 of the same Act enacts, that "if any person commits any of the offences following, that is to say,

"(1.) Prints any copy of any proclamation, order, or regulation, which falsely purports to have been printed by the government printer, or to be printed under the authority of the Legislature of any British colony or possession, or tenders in evidence any copy of any proclamation, order, or regulation, which falsely purports to have been printed as aforesaid, knowing that the same was not so printed; or

"(2.) Forges, or tenders in evidence, knowing the same to have been forged, any certificate by this Act authorised to be annexed to a copy of or ex-

tract from any proclamation, order, or regulation; he shall be guilty of felony, and shall on conviction be liable to be sentenced to penal servitude for such term as is prescribed by ['The Penal Servitude Act, 1891' (54 & 55 V. c. 69, § 1)], as the least term to which an offender can be sentenced to penal servitude" (that is, "three years"), "or to be imprisoned for any term not exceeding two years, with or without hard labour."

By § 5 of the same Act, "the following words shall in this Act have the meaning hereinafter assigned to them, unless there is something in the context repugnant to such construction; (that is to say,)

"'British colony and possession' shall for the purposes of this Act include the Channel Islands, the Isle of Man, and such territories as may for the time being be vested in His Majesty, by virtue of any Act of Parliament for the government of India and all other His Majesty's dominions: "'Legislature' shall signify any

§§ 1527—
1530. Sect. 6 of the Documentary Evidence Act, 1868, enacts, that
“the provisions of this Act shall be deemed to be in addition to, and not in derogation of, any powers of proving documents given by any existing statute or existing at common law.”

§ 1528. All *proclamations, treaties, and other acts of state*, of any *Foreign State* or of any *British Colony*, may be proved either by examined copies, or by copies *purporting* to bear the seal of the state or colony to which they respectively belong.¹ But a mere book purporting to be a collection of treaties concluded by America, and to have been published by authority there, as a regular copy of the archives in Washington, vouched by the evidence of the American minister resident at this court, that such book was the rule of his conduct, was rejected.²

§ 1529. Copies of the *Journals* of either House of Parliament are rendered admissible in evidence (as already seen)³ by the Documentary Evidence Act, 1845,⁴ if they *purport* to be printed by the printers of either House; and it is not necessary to prove that they were in fact so printed.⁴

§ 1530. The *Articles of War* for the government of the navy, the army, and the marines, are respectively embodied or

authority, other than the Imperial Parliament or His Majesty in Council, competent to make laws for any colony or possession:

“‘Privy Council’ shall include His Majesty in Council, and the lords and others of His Majesty’s Privy Council, or any of them, and any committee of the Privy Council that is not specially named in the schedule hereto: also the Privy Council in Ireland or any committee thereof [see 45 V. c. 9, § 4]:

“‘Government printer’ shall mean and include the printer to His Majesty, whether in England or Ireland, and any printer printing either in England or Ireland under the superintendence or authority of His Majesty’s Stationery Office [see 45 V. c. 9, §§ 2, 4], and any printer purporting to be the printer

authorised to print the statutes, ordinances, acts of state, or other public acts of the Legislature of any British colony or possession, or otherwise to be the government printer of such colony or possession:

“‘Gazette’ shall include ‘The London Gazette,’ ‘The Edinburgh Gazette,’ and ‘The Dublin Gazette,’ or any of such gazettes.”

¹ 14 & 15 V. c. 99 (“The Evidence Act, 1851”), § 7, cited ante, § 10.

² *Richardson v. Anderson*, 1805, 1 Camp. 65, n. (a) (Id. Ellenborough, who observed that he would have rejected a book purporting to be one of Spanish treaties, even if it also purported to be printed by the printer to the King of Spain).

³ See ante, §§ 7, 8.

⁴ 8 & 9 V. c. 113, § 3; cited ante. §§ 7, 8.

authorised in public statutes,¹ and, consequently, require no proof.² §§ 1530—1533.

§ 1531. *The Reports made by the Commissioners or the Surveyor-General of the Woods and Forests*, either to the King or to Parliament, may, by the Crown Lands Act, 1873, be proved by copies purporting to have been printed by the order of either House.³ This enactment might well be rendered applicable to all reports presented either to the Crown or to Parliament.

§ 1532. In Ireland a *deed founding a public trust* has been regarded as quasi-public, and an alleged extract from it, which was publicly exhibited and subsequently kept by a governor of the trust and purported to be signed by the founder of the charity, has been admitted in evidence.⁴

§ 1533. *General records of the realm*, in the custody of the Master of the Rolls,⁵ may be proved by copies purporting to be certified by the deputy-keeper of the records, or one of the assistant record-keepers, and to be sealed or stamped with the seal of the Record Office.⁵ In cases of importance before the House of

¹ 29 & 30 V. c. 109 ("The Naval Discipline Act, 1866"); 44 & 45 V. c. 58 ("The Army Act, 1881"), §§ 69, 179.

² Ante, § 5. Nevertheless, an express provision to this effect (perhaps a superfluous one) is contained in § 163, sub-s. (c) as amended by 58 V. c. 7 ("The Army Act, 1895"), and in § 179, sub-s. 11 of "The Army Act, 1881" (44 & 45 V. c. 58), enacting that all "copies purporting to be printed by a government printer," whether of King's regulations, including Admiralty regulations so far as concerns the Royal Marines, or of royal warrants, or of army circulars, or of rules made by His Majesty, or a Secretary of State, in pursuance of that Act, shall be evidence of such regulations, royal warrants, army circulars and rules. "The Military Manœuvres Act, 1882" (45 V. c. 10), §§ 5, 10, also contains some special provisions for facilitating the proof of certain orders, regulations, and rules, which the consultative commission appointed by that statute are authorised to make.

³ 36 & 37 V. c. 36, § 6

⁴ *In re Hospital for Incurables*, 1884, 13 L. R. Ir. 361.

⁵ By 1 & 2 V. c. 94 ("The Public Record Office Act, 1838"), § 12, "the Master of the Rolls or deputy-keeper of the records may allow copies to be made of any records in the custody of the Master of the Rolls, at the request and costs of any person desirous of procuring the same; and any copy so made shall be examined and certified as a true and authentic copy by the deputy-keeper of the records, or one of the assistant record-keepers aforesaid, and shall be sealed or stamped with the seal of the Record Office, and delivered to the party for whose use it was made." By § 13, "every copy of a record in the custody of the Master of the Rolls, certified as aforesaid, and purporting to be sealed or stamped with the seal of the Record Office, shall be received as evidence in all courts of justice, and before all legal tribunals, and before either House of Parliament, or any committee of either House, without any further or other proof thereof, in

§§ 1533— Lords or elsewhere, permission will, however, be given to one of the assistant-keepers to produce the original record.
1535.

§ 1534. The *records of courts of justice*, and other judicial writings, constitute another class of public documents. Amongst these are the *records* of the Supreme Court, and of the old *superior courts* of law and equity, and the *quasi records* of those courts. An *original record* of the High Court, if required to be produced, is subject to the following R. S. C.:—"No affidavit or record of the court, shall be taken out of the Central Office without the order of a judge or master, and no subpoena for the production of any such document shall be issued."¹ The expression "quasi records" embraces depositions, affidavits, bills, answers, orders, and decrees, filed in the old Court of Chancery, rules of court, and certain other documents, which although not strictly records,² partake so much of their nature, that they can be proved by means of copies³ to the same extent as records, and are subject generally to the same rules of evidence. But, for the sake of convenience, the general term "records" will alone be used in this work, and will include all the documents just mentioned. Now, subject to the rule just cited,⁴ the records of the superior courts may be proved by the mere production of the *originals*. They may also be proved by the production of a duly certified copy of an entry in the Entry-Book of Judgments of the court in which judgment was given.⁵ They further may be proved by means of *copies*.⁶

§ 1535. Of copies there are *four kinds*; viz., exemplifications

every case in which the original record could have been received there as evidence." For the corresponding enactments in "The Public Records (Ireland) Acts, 1867 and 1875," see 30 & 31 V. c. 70, §§ 19, 20, Ir.; 38 & 39 V. c. 59, §§ 9, 10, Ir.

¹ R. S. C. 1883, Ord. LXI. r. 28.

² B. N. P. 235. Buller, J., after stating that a record is "a memorial of what is the law of the nation," adds, "now Chancery proceedings are no memorials of the laws of England, because the *Chancellor* is not bound to proceed according to the law." As to rules of court not being records, see *R. v. Bingham*, 1829, 3 Y. & J. 109. Records of the Chan-

cery Division of the High Court, however, clearly are evidence.

³ See, as to decrees: B. N. P. 234. 235; as to bills and answers: *Ewer v. Ambrose*, 1825, 4 B. & C. 24; as to depositions in Chancery: *Highfield v. Peake*, 1827, M. & M. 109; as to affidavits: *Davies v. Davies*, 1840, 9 C. & P. 252; *Garvin v. Carroll*, 1847, 10 Ir. L. R. 330; as to rules of court: *Selby v. Harris*, 1698, 1 Ld. Raym. 745; *Duncan v. Scott*, 1807, 1 Camp. 100.

⁴ Viz., Order LXI. r. 28.

⁵ In *re Tollemache*, Ex parte Anderson, 1885, 14 Q. B. D. 606.

⁶ Ante, § 439. Post, § 1598.

under the Great Seal ; exemplifications under the seal of the particular court where the record remains ; office copies ; and examined copies.¹ Copies of one or the other of these four sorts will always be admissible in lieu of the original *record excepting in two cases* :² first, if issue has been joined on a statement of defence or a reply of *nul tiel record*, in some cause in a court to which the disputed record belongs ;³ and secondly, if a person be indicted for perjury in any affidavit, or deposition, or for forgery with respect to any record.⁴ In either of these two cases the original document,—unless it be shown that the prisoner has got possession of it, or that it has been lost or destroyed,⁵—must be actually produced. Moreover, on a trial for perjury, not only must the original record be produced, but the signatures of the defendant, and of the person whose name is attached to the jurat, must be proved ;⁶ after which the court will presume that the oath was duly administered.⁷ To ensure the production of the original record, application should be made to the court to which it belongs, or to a judge or master thereof, who will make the necessary order.⁸

§§ 1535,
1536.

§ 1536. Returning to the consideration of the admissibility of each of the four copies above indicated,⁹ we note that the first-named of these, viz., an *exemplification under the Great Seal*, was formerly required where an issue was raised as to the *existence of a record which did not belong to the same court*. To obtain this, if the record did not belong to the old Court of Chancery, a literal

¹ B. N. P. 226—228.

² As to a possible third case, see ante, § 1448.

³ 2 Ph. Ev. 196.

⁴ B. N. P. 290 ; R. v. Morris, 1761, 2 Burr. 1189 ; R. v. Benson, 1810, 2 Camp. 508 ; R. v. Spencer, 1824, Ry. & M. 97 ; Crook v. Dowling, 1782, 3 Doug. 77 ; Stratford v. Greene, 1810, 1 Ball. & B. 296 ; Garvin v. Carroll, 1847, 10 Ir. L. R. 330 ; Lady Dartmouth v. Roberts, 1812, 16 East, 334 (Ld. Ellenborough and Le Blanc, J.). In this last case, the opinion intimated, that the same strictness was necessary in actions for malicious prosecution, would seem to be a mistake. See B. N. P. 13 ; Purcell v. McNamara, 1808, 1

Camp. 200.

⁵ R. v. Milnes, 1860, 2 F. & F. 10.

⁶ See cases cited in last note but one.

⁷ R. v. Spencer, 1824, Ry. & M. 97 ; R. v. Turner, 1848, 2 C. & K. 732.

⁸ See ante, § 1532 ; Crook v. Dowling, 1782, 3 Doug. 77 ; Bastard v. Smith, 1839, 10 A. & E. 213 ; Bentall v. Sidney, 1839, 10 A. & E. 164. The application to the court for leave to take an affidavit off the file, in order to prosecute the defendant for perjury, will be granted as a matter of right : Stratford v. Greene, 1810, 1 Ball. & B. 296 ; Keinan v. Boylan, 1803, 1 Sch. & Lef. 232.

⁹ Supra, § 1534.

§§ 1536—1538. transcript of it was removed thither by certiorari, (the Court of Chancery being regarded as the centre of all the courts, and the Great Seal being kept there,) and then the exemplification was transmitted by mittimus out of Chancery to the court in which the cause was pending.¹ An exemplification under the Great Seal is considered a record of the highest validity.² It, too, was the proper mode of proof, where the existence of a judgment of one of the superior courts was put in issue in any County Court.³ The proper mode of proceeding now would be by the production of an office copy under Order XXXVII. r. 4.⁴

§ 1537. Exemplifications under the seal of the court where the record remains, are the second of the above-mentioned two kinds of exemplifications, and also the second of the four above-mentioned kinds of copies. Exemplifications of the second sort may be used as proofs thereof when the existence or contents of the record are *not directly in issue*. Practically, however, recourse is seldom had to this medium of proof, where the record belongs to any Division of the Supreme Court.⁵

§ 1537A. Both the above-named species of *exemplifications* are *proved by mere production*, as the judges are bound to take judicial notice of the seals attached to them;⁶ and are deemed of higher credit than examined copies being presumed to have undergone a more critical examination.⁷

§ 1538. The third of the four above-mentioned kinds of copies is an *office copy* of a record. By an "office copy" is meant a copy authenticated by a person intrusted with the power of furnishing copies. It is admitted in evidence upon the credit of the officer without proof that it has been actually examined, and it has ever been regarded, even at common law, when tendered as evidence in the *same court*, and in the *same cause*, as equivalent to the record itself.⁸ Its admissibility is, however, now much extended, as the Rr. S. C. provide, that "office copies of all writs, records, pleadings,

¹ B. N. P. 226 b; *Hewson v. infra.*

Brown, 1760, 2 Burr. 1034.

² B. N. P. 226 b, 228.

³ *Winsor v. Durnford*, 1848, 18 L. J. Q. B. 14.

⁴ Set out in full, *infra*, § 1538, which see further on the point.

⁵ See R. S. C. Ord. XXXVII. r. 4,

⁶ *Ante*, § 6.

⁷ B. N. P. 226 b, 228.

⁸ *Den. v. Fulford*, 1761, 2 Burr. 1179; *Jack v. Kiernan*, 1840, 2 Jebb. & Sy. 231 (Ir.); *Barron v. Daniel*, 1838, Crawford & D. Abr. Cas. 283 (Ir.).

and documents filed in the High Court shall be admissible in evidence in all causes and matters, and between all persons or parties, to the same extent as the original would be admissible."¹ The Rules, moreover, provide further, that office copies of *affidavits*, duly authenticated with the seal of the office, may, in all cases, be used, provided the originals have been duly filed;² and original *affidavits* may, in some cases, be used before filing,³ and even an office copy of an affidavit of discovery of documents is not necessary.⁴

§§ 1538—
1540-41.

§ 1539. It is provided,⁵ that, "All copies, certificates, and other documents, appearing to be sealed with a seal of the Central Office, shall be presumed to be office copies or certificates or other documents issued from the Central Office, and, if duly stamped, may be received in evidence, and no signature or other formality, except the sealing with a seal of the Central Office, shall be required for the authentication of any such copy, certificate or other document." As has been already stated,⁶ the Central Office of the Supreme Court is now divided into the following ten Departments:—1. Writ, appearance and judgment. 2. Summons and Order. 3. Filing and Record. 4. Taxing. 5. Enrolment. 6. Judgments and Married Women's acknowledgments. 7. Bills of Sale. 8. King's Remembrancer. 9. Crown Office. 10. Associates.⁷ Each of these has an official seal.⁸

§§ 1540—41. Independently of the general provision set out in the preceding paragraph, office copies of some of the records of the Supreme Court and of the Central Office are by statute rendered admissible in evidence in all courts.⁹

¹ R. S. C. Ord. XXXVII. r 4.

² Ord. XXXVIII. r. 15.

³ Id., and Ord. LXV. r. 27, subs. 53.

⁴ Ord. LXV. r. 27, subs. 54.

⁵ Ord. LXI. r. 7.

⁶ See Ord. LXI. And see, also, ante, § 1491A, n.

⁷ R. 1 of Ord. LXI.

⁸ R. 6 of Ord. LXI.

⁹ Thus, the following office copies are by statute admissible:—Certificates of *Acknowledgments of Deeds by Married Women*, which are filed in No. 6 Department of the Central Office, may, by virtue of "The Con-

veyancing Act, 1882" (45 & 46 V. c. 39, § 7, subs. 7 and 8; see, also, 4 & 5 W. 4, c. 92, § 79, Ir.), be proved by office copies. Under "*The Bills of Sale Act, 1878*" (41 & 42 V. c. 31, § 16; 42 & 43 V. c. 50, § 16, Ir.; see *Emmott v. Marchant*, 1878), any person may, on paying the proper fees, have an office copy or extract of any bill of sale registered in the Central Office (see Ord. LXI. r. 1), and of the affidavit of execution filed therewith, or of any copy thereof with its accompanying affidavit, or of any registered affidavit of renewal; and any such copy shall in all courts

**§§ 1542,
1543.**

§ 1542. It would be no easy matter to enumerate all the records and documents which formerly belonged to the old Common Law side of the Court of Chancery, and were deposited in the Petty Bag Office,¹ and which may now, under the above enactment, be proved by office copies.²

§ 1543. Before leaving the subject of office copies, attention may be drawn to a provision in the rules regulating proceedings in Divorce and Matrimonial causes, which is very likely to mislead. Documents relating to any matter or suit depending in the Court for Divorce and Matrimonial Causes, are now (Rule 118) deposited in the Registry of the Court of Probate; and the registrar of that court is bound to permit searches and inspection, and to grant copies and extracts, as if the documents had reference to some disputed probate. But Rule 119 provides that "office copies or extracts furnished from the Registry of the Court of

and before all persons, "be admitted as *prima facie* evidence thereof, and of the fact and date of registration as shown thereon." The orders and decisions of the Court of Appeal from the decisions of *Revising Barristers* may be proved by copies, though such copies are not strictly "office copies," as they bear no official seal, but must purport to be signed by a master of the court (see 6 and 7 V. c. 18 ("The Parliamentary Voters Registration Act, 1883"), §§ 66, 68; and, for the corresponding law in Ireland, 13 & 14 V. c. 69 ("The Representation of the People (Ireland) Act, 1850"), §§ 79, 91). Certificates of *Searches* made, under "The Conveyancing Act, 1882" (45 & 46 V. c. 39), in the Central Office for entries of judgments, deeds, matters, or documents, setting forth the result of such search must, under § 2 of the Act, be filed by the proper officer; and every such certificate may be proved by an office copy, and shall, in favour of a purchaser, furnish conclusive evidence "according to the tenour thereof," whether affirmative or negative.

¹ See 37 and 38 V. c. 81 ("The Great Seal (Offices) Act, 1874"), §§ 5, 10, which give power to abolish this office, and to transfer the muniments elsewhere. By R. S. C. Jan.

1889 the duties and powers of the clerk of the Petty Bag (except such as are by the Solicitors Act, 1888, directed to be performed by the Incorporated Law Soc.) are vested in the senior clerk of the Crown Office Dept. of the Central Office.

² Among the most important of these are the *Bedford Level* decrees: the *Charity Commissioners'* decrees, from the reign of Queen Elizabeth: *Escheats* commissions and inquisitions, from the time of Charles II.: *Lunacy* commissions and inquisitions, from the same date; *Parliamentary Records*, including the *Parliament Pawns*, that is, the list of writs issued on calling new Parliaments, from the time of Henry VII.; a few qualifications of members of Parliament; and the returns of members to Parliament from the date of the Restoration: *Patents and Specifications* records, which, prior to the 1st of January, 1849, were enrolled in this office: *Returns to writs*, including those for electing coroners, verderors, and regardors; those for swearing in the old masters extraordinary of the Court of Chancery and justices of the peace; those of *scire facias*, and many others which have issued from what used to be the common law side of the Court of Chancery. See 12 & 13 V. c. 109, § 14.

Probate will *not be collated* with the originals from which the same are copied, unless specially required. *Every copy so required shall be certified under the hand of one of the principal Registrars of the Court of Probate to be an examined copy.*" And by Rule 120, "the seal of the court will not be affixed to any copy which is not certified to be an examined copy." Documents deposited with the Probate Division of the High Court are, in short, required to be proved by *examined*¹ copies, and not by mere *office* copies.

§ 1544. In Ireland, although the officers of the superior courts are authorised, if not required, by statute,² to furnish office copies of the proceedings of such courts, these copies, with one statutory exception, seem to be only admissible in evidence, in the same cause and the same court.³ The one exception, just mentioned, arises on an Act⁴ which enacts, that in every proceeding before the court of the assistant barrister, or of the judge of assize upon appeal, an *office copy* of any judgment, decree, or order, made by or before any court of law or equity in Ireland, *certified to be a true copy* by the proper officer of such court, shall, *upon proof of such officer's handwriting*, be deemed and taken as *prima facie* evidence of such document. This clause sets at naught the valuable provisions of the Documentary Evidence Act, 1845, relating to the proof of copies.⁵

§ 1545. An *examined copy* is the fourth kind of copy mentioned above,⁶ and the most usual means of proving records. When proof by means of an examined copy is adopted, a witness must swear that he has compared the copy tendered in evidence with the original, or with what the officer of the court, or any other person, read as the contents of the record, and that such copy is correct.⁷ It is not necessary for the persons examining to exchange papers, and read them alternately both ways;⁸ but it is

¹ As to which, see *infra*, § 1545.

² See 7 & 8 V. c. 107, § 11, and Sched., Ir.

³ *Jack v. Kiernan*, 1840, 2 Jebb & Sy. 231 (Ir.).

⁴ "The Civil Bill Courts (Ireland) Act, 1851" (14 & 15 V. c. 57), § 107.

⁵ *Supra*, §§ 7—8.

⁶ § 1534.

⁷ *Reid v. Margison*, 1808, 1 Camp. 469; *Gyles v. Hill*, 1809, 1 Camp.

471, *n.*; *M'Neil v. Perchard*, 1795, 1 Esp. 264; *Fyson v. Kemp*, 1833, 6 C. & P. 71; *Rolf v. Dart*, 1809, 2 Taunt. 51; *R. v. M'Donald*, 1841, Arm. M. & O. 112 (Ir.); *R. v. Hughes*, 1839, 1 Crawf. & D. C. C. 13 (Ir.); *Hill v. Packard*, 1830, 5 Wend. 387 (Am.); *Lynde v. Judd*, 1807, 3 Day, 499 (Am.).

⁸ Cases cited in last note.

§§ 1545,
1546.

necessary that the copy should be an accurate and complete copy, and, therefore, if it contains abbreviations where, in the original, words were written at length, it cannot be received.¹ Moreover, if the record be written or printed in an ancient or foreign character, the witness, who has compared the copy with it, must have been able to read and understand the original.² It must also appear in all these cases, that the record from which the copy was taken was found in the proper place of deposit, or in the hands of the officer in whose custody the records of the court are kept. And this cannot be shown by any light reflected from the record itself, which may have been improperly placed where it was found.³

§ 1546. The records or judicial proceedings of the old Admiralty Court,⁴ of the Ecclesiastical Courts,⁵ of the Court of Stannaries,⁶ and of the Courts of Quarter Sessions, may be proved, either by producing the originals, or by means of exemplifications, whether under the Great Seal or under the seals of the respective courts (which latter seals require no proof);⁷ or by office copies in the same cause and the same Court;⁸ or by examined copies in any court.⁹ Indeed, these modes of proof are generally available with respect to the judgments or other proceedings of all inferior courts of record;¹⁰ and even where the court is not one of record, and where short notes of its proceedings are alone kept, these notes, being considered as public documents, may be proved by examined copies.¹¹ Where the existence of a record or judgment of any of the inferior common-law courts is put in issue in some cause in the King's Bench Division, the party who has to produce the document questioned, may move that court for a certiorari; and on the issuing of this writ, a literal transcript of the document, under the seal of the inferior tribunal, will be

¹ *R. v. Christian*, 1842, Car. & M. 388.

² *Crawford and Lindsay Peer.*, 1845-8, 2 H. L. C. 534.

³ *Adamthwaite v. Synge*, 1816, 1 Stark. R. 183.

⁴ See 3 & 4 V. c. 65; 24 & 25 V. c. 10 ("The Admiralty Court Act, 1861"); 30 & 31 V. c. 114, Ir. Both the last-mentioned Acts are amended by 57 & 58 V. c. 60 ("The

Merchant Shipping Act, 1894").

⁵ See 6 & 7 V. c. 38 ("The Judicial Committee Act, 1843"), § 14.

⁶ See 6 & 7 W. 4, c. 106 ("The Stannaries Act. 1836"), §§ 19, 21.

⁷ *Ante*, § 6.

⁸ *Ante*, § 1538.

⁹ *R. v. Hains*, 1695, Comb. 337 (Holt, C.J.).

¹⁰ *Id.*

¹¹ *Id.*

returned directly into the court, and will be sufficient to counter-vail the statement of defence denying the existence of the original.¹

§§ 1546—
1548.

§ 1547. While the records, and other judicial proceedings, of all inferior Courts are capable of the above common-law modes of proof, special *statutes* have in a few instances been passed with a view of *facilitating the proof*, either of the records or other proceedings of *particular tribunals*, or of *particular records and documents*. The Acts which thus render a convenient species of evidence admissible, do not deprive parties of the right of having recourse to any other mode of proof allowable at common law; or, in other words, the *statutable methods of proof are cumulative and not substitutionary*. Indeed, it is a doctrine founded on common sense, largely sanctioned by authority, and especially applicable where the common law is concerned, that, unless the enactment of a new provision clearly indicates an intention by the Legislature to abrogate the old law, both shall be understood to stand together, provided their so doing would not be impossible or obviously absurd.²

§ 1548. In the first place, numerous provisions facilitating proof of proceedings under that Act are contained in "The Bankruptcy Act, 1883."³ Thus,⁴ "any petition or copy of a petition

¹ Woodcraft v. Kinaston, 1742, 2 Atk. 317 (Ld. Hardwicke); Butcher's case, 1601, Cro. Eliz. 821.

² Escott v. Mastin, 1842, 4 Moo. P. C. C. 130; Northam v. Latouche, 1829, 4 C. & P. 140; R. v. Carter, 1845, 1 Den. C. C. 65; Edwards v. Buchanan, 1832, 3 B. & Ad. 788.

³ 46 & 47 V. c. 52. As to "The Bankruptcy (Scotland) Act, 1856," see post, § 1559. "The Irish Bankrupt and Insolvent Act, 1857" (20 & 21 V. c. 60), enacts, in § 361, that "every petition of bankruptcy, petition of insolvency, schedule, adjudication, petition for arrangement between a debtor and his creditors, appointment of assignees, certificate, deposition, order, document or other proceeding in bankruptcy or insolvency, or under any such position for arrangement, appearing to be sealed with the seal of the court, or any writing purporting to be a copy of any such document, and purporting to be so sealed, shall at all times,

and on behalf of all persons, and whether for the purposes of this Act or otherwise, be admitted in all courts whatever as evidence of such documents respectively, and of such proceedings and orders having respectively taken place or been made, without any further proof thereof; provided always, that all commissions of bankrupt, depositions, and other proceedings under the same, which may have been entered of record before the commencement of this Act, and having the certificate of entry thereon, purporting to be signed by the person appointed to enter the same by the Act of the Irish Parliament, 11 & 12 G. 3, c. 8, and the Act 6 & 7 W. 4, c. 14, or his deputy, shall, without proof of the appointment or handwriting of such person, be received as evidence of the same, and of the same having been duly entered of record, and of such proceedings having respectively taken place."

⁴ By § 134. See, as to the former

§§ 1548— in bankruptcy, any order¹ or certificate, or copy of an order or
 1550. certificate, made by any court having jurisdiction in bankruptcy, any instrument, or copy of an instrument, affidavit, or document, made or used in the course of any bankruptcy proceedings, or other proceedings had under this Act, shall, if it appears to be sealed with the seal of any court having jurisdiction in bankruptcy, or purports to be signed by any judge thereof, or is certified as a true copy by any registrar thereof, be receivable in evidence in all legal proceedings whatever.”

§ 1549. It is again, in addition to this general enactment, provided by the Bankruptcy Act, and the Rules made under it,² that the proof of particular documents shall be facilitated, and that their admissibility and effect shall be enlarged in several respects. Thus, “A copy of the London Gazette, containing any notice inserted therein in pursuance of this Act, is to be evidence of the facts stated in the notice.”³ The notices here referred to—which must all be gazetted by the Board of Trade,⁴—are ten in number, and relate to, (1) Receiving orders; (2) First meetings; (3) Adjudications; (4) Approvals of compositions or schemes; (5) Intended dividends; (6) Dividends; (7) Applications for discharge; (8) Adjudications annulled; (9) Appointments of Trustees, and (10) Orders on application for discharge. And by a sub-section in the Act,⁵ “the production of a copy of the London Gazette containing any notice of a receiving order,⁶ or of an order adjudging a debtor bankrupt,⁷ shall be *conclusive* evidence in all legal proceedings of the order having been duly made, and of its date.”

§ 1550. Moreover, the appointment of a trustee in bankruptcy under the Bankruptcy Act, 1883⁸ (and probably, too, that of a trustee appointed under the Bankruptcy Act of 1890, in a composition, or a scheme of arrangement⁹), will be *conclusively* proved by producing the certificate of the Board of Trade, declaring him

law on this point, 24 & 25 V. c. 134, § 203; 32 & 33 V. c. 71, § 107.

¹ R. v. Thomas, 1870, 11 Cox, C. C. 535, as to orders of adjudication.

² In pursuance of § 127.

³ § 132, sub-sect. 1.

⁴ R. 280. But see Sched. I. r. 2, which directs the official receiver to

gazette the notices of first meetings.

⁵ § 132, sub-sect. 2.

⁶ § 13.

⁷ § 20, sub-sect. 2.

⁸ 46 & 47 V. c. 52.

⁹ 46 & 47 V. c. 52; 53 & 54 V. c. 71, § 3.

to be such trustee.¹ The appointment of all official receivers, and assistant official receivers, by such Board must again be *judicially noticed*;² and a certificate of the official receiver that a composition or scheme has been duly accepted by the creditors and approved by the court, is also, "in the absence of fraud, *conclusive* as to its validity."³

§ 1551. Further, by the Bankruptcy Act, 1890, not only is the court, on hearing any application for the discharge of a bankrupt, now required to "take into consideration a report of the official receiver as to the bankrupt's conduct and affairs,"⁴ but, for the purposes of this inquiry, such report is—contrary to the ordinary rules of justice—to be received as "prima facie evidence of the statements therein contained."⁵ And, again, the Bankruptcy Rules, 1886, 1890, provide that when the Board of Trade has objected to the appointment of a trustee, and has, at the instance of the creditors, notified the objection to the High Court, any report of the grounds of the objection, when communicated by the Board to the court, must be received as "prima facie evidence of statements therein contained."⁶

§ 1552. By the Bankruptcy Act, 1883,⁷ too, not only is it directed that the chairman⁸ of every meeting of creditors shall "cause minutes of the proceedings at the meeting to be drawn up, and fairly entered in a book kept for that purpose, and the minutes shall be signed by him or by the chairman of the next ensuing meeting;" but⁹ any such minute, "signed at the same or the next ensuing meeting, by a person describing himself as, or appearing to be, chairman of the meeting at which the minute is signed, shall be received in evidence without further proof;" and,¹⁰ "until the contrary is proved, every meeting of creditors, in respect of the proceedings whereof a minute has been so signed, shall be deemed to have been duly convened and held, and all

¹ § 138; r. 218; F. 71.

² R. 321.

³ 53 & 54 V. c. 71, § 3, sub-sect. 13.

⁴ Id. § 8, sub-sect. 2.

⁵ Id. sub-sect. 5.

⁶ R. 299, sub-sects. 1 and 2.

⁷ 46 & 47 V. c. 52, Sched. I. r. 52.

⁸ The chairman has *prima facie*

authority to decide all incidental questions requiring immediate decision, and his decision as entered on the minutes is *prima facie* correct: In re Indian Zoedone Co., 1884, 26 Ch. D. 70 (C. A.).

⁹ By § 133, sub-sect. 1 of same Act.

¹⁰ Id. sub-sect. 2.

§§ 1552— resolutions passed or proceedings had thereat to have been duly
 1554. passed or had." Rule 58 of the Bankruptcy Rules, 1886, 1890, provides, that "the court shall take *judicial notice* of the seal or signature of any person, authorised by or under the Act to take affidavits, or to certify to such authority."

§ 1553. The Bankruptcy Act of 1883 also provides,¹ that "subject to general rules, any affidavit to be used in a bankruptcy court may be sworn before any person authorised to administer oaths in the High Court, or in the Court of Chancery of the County Palatine of Lancaster, or before any registrar of a bankruptcy court, or before *any officer of a bankruptcy court authorised in writing on that behalf by the judge of the court*, or, in the case of a person residing in Scotland or in Ireland, before a judge ordinary, magistrate, or justice of the peace, or, in the case of a person who is out of the kingdom of Great Britain and Ireland, before a magistrate, or justice of the peace, or other person qualified to administer oaths in the country where he resides (he being certified to be a magistrate, or justice of the peace, or qualified as aforesaid, by a British minister or British consul, or by a notary public)."²

§ 1554.³ The County Court Act, 1888,⁴ provides in § 28, that "the registrar of every court shall cause a note of all complaints and summonses, and of all orders, and of all judgments and executions, and returns thereto, and of all fines, and of all other proceedings of the court, to be fairly entered from time to time in a book belonging to the court, which shall be kept at the office of the court; and such entries in the said book, or a copy thereof bearing the seal of the court, and purporting to be signed and certified as a true copy by the registrar of the court, shall at all

¹ 46 & 47 V. c. 52, § 135.

² Where an affidavit or proof in bankruptcy is sworn abroad before a British consul or vice-consul a notarial certificate in verification of the signature and qualification of the consul or vice-consul is not required. In re Magee, 1885, 15 Q. B. D. 332. See further as to the proof and admissibility of particular proceedings in bankruptcy, post, §§ 1747 et seq.

³ See post, § 1586A.

⁴ 51 & 52 V. c. 43. As to the mode of proving Civil Bill decrees in Ireland, see and compare 14 & 15 V. c. 57 ("The Civil Bill Courts (Ireland) Act, 1851"), §§ 10, 97, 110, 114; 27 & 28 V. c. 99, § 57, cited post, § 1572; *Alcorn v. Larkin*, 1842, Arm. M. & O. 367; and *Donagh v. Bergin*, 1842, Arm. M. & O. 367.

times be admitted in all courts and places whatsoever, as evidence of such entries, and of the proceeding referred to by such entry or entries, and of the regularity of such proceeding,¹ without any further proof." The note entered by the Registrar of the County Court in his book cannot be contradicted even by an entry made by the judge in his own minute book.²

§ 1555. The Summary Jurisdiction Act, 1879, provides for the keeping by the clerk of every such court of a register, and that extracts therefrom certified by him shall be evidence in any other Court of Summary Jurisdiction.³

§ 1555A. The proceedings of courts-martial, by virtue of the Army Act, 1881, are, moreover, rendered admissible in evidence on their mere production, if purporting to be signed by the President, and coming from the custody of the Judge Advocate-General or of the officer having charge of them; and they may also be proved by copies purporting to be certified by such judge-advocate, or his deputy, or by such other officer as aforesaid.⁴

§ 1555B. The verdicts and judgments in compensation cases under the Lands Clauses Consolidation Act must be signed by the sheriffs, and deposited with the records of the Quarter Sessions; and the same, or copies thereof signed and certified to be true copies by the Clerk of the Peace, are good evidence in all courts and elsewhere.⁵

§ 1555c. Various other statutes facilitate the proof of convictions under their respective provisions.⁶

§ 1556. The records and judicial proceedings of foreign and

¹ As, for instance, the regularity of the appointment of a deputy judge: *R. v. Roberts*, 1878, 14 Cox, C. C. 101.

² *Dews v. Ryley*, 1851, 20 L. J. C. P. 264.

³ See 42 & 43 V. c. 49, § 22; and also § 31, sub-sect. 6.

⁴ 44 & 45 V. c. 58, § 165.

⁵ 8 & 9 V. c. 18, § 50.

⁶ Thus, under "*The Customs Consolidation Act, 1876*," "Condemnation by any justice under the customs laws, may be proved in any court of justice, or before any competent tribunal, by the production of a cer-

tificate of such condemnation, purporting to be signed by such justice, or an *examined* copy of the record of such condemnation certified by the clerk to such justice." See 39 & 40 V. c. 36, § 263. Amongst others, summary convictions for offences against "*The Factory and Workshop Act, 1901*" (1 Ed. 7, c. 22), or against "*The Seamen's Clothing Act, 1869*" (32 & 33 V. c. 57, § 6), may respectively be proved upon any future proceedings under these Acts, by copies certified under the hand of the Clerk of the Peace.

§§ 1556,
1557.

colonial courts, including those of the Channel Islands, India, and all other possessions of the British Crown, except Scotland,¹ are proveable as directed by Lord Brougham's Evidence Act of 1851,² which enacts,³ that all judgments, decrees, orders, and other judicial proceedings of any court of justice in any Foreign State, or in any British Colony, and all affidavits, pleadings, and other legal documents, filed or deposited in any such court, may be proved either by examined copies, or by copies authenticated as follows: that is to say, they must purport either to be sealed with the seal of the court to which the originals belong; or if there be no seal, to be signed by one of the judges of such court, who must also certify to the fact of there being no seal. When these provisions are complied with, no evidence is required either to authenticate the seal, signature, or certificate attached to the copy or to prove the official character of the judge. If the foreign document, sought to be proved by a copy, does not fall within the language of the section just cited, evidence must be given that it is a public writing deposited in some registry or place, whence, by the law or the established usage of the country, it cannot be removed,⁴ and the copy must then be shown to have been duly examined.

§ 1557. Besides the section just referred to, Lord Brougham's Evidence Act of 1851⁵ contains several clauses which greatly facilitate the proof of English documents in Ireland, of Irish documents in England, and of English and Irish documents in the Colonies. Thus it⁶ enacts, that "every document, which by any law now in force or hereafter to be in force, is, or shall be, admissible in evidence of any particular in any court of justice in England or Wales, without proof of the seal, or stamp, or signature, authenticating the same, or of the judicial or official character of the person appearing to have signed the same, shall be admitted in evidence to the same extent and for the same purposes in any court of justice in Ireland, or before any person having in Ireland, by law or by consent of parties, authority to hear, receive, and examine evidence, without proof of the seal, or

¹ 14 & 15 V. c. 99, §§ 18, 19.

² *Id.*, § 7, cited ante, § 10.

³ § 7.

⁴ *Alivon v. Furnival*, 1834, 3 L. J.

Ex. 241; *Furnell v. Stackpoole*, 1831, Milward, 485 (Ir.).

⁵ 14 & 15 V. c. 99.

⁶ § 9.

stamp, or signature, authenticating the same, or of the judicial or official character of the person appearing to have signed the same." It also enacts,¹ that "every document, which, by any law now in force or hereafter to be in force, is or shall be, admissible in evidence of any particular in any court of justice in Ireland, without proof of the seal, or stamp, or signature authenticating the same, or of the judicial or official character of the person appearing to have signed the same, shall be admitted in evidence to the same extent and for the same purposes in any court of justice in England or Wales, or before any person having in England or Wales, by law or by consent of parties, authority to hear, receive, and examine evidence, without proof of the seal, or stamp, or signature, authenticating the same, or of the judicial or official character of the person appearing to have signed the same." It further enacts,² that every document, which, by any law now in force or hereafter to be in force, is, or shall be, admissible in evidence of any particular in any court of justice in England or Wales or Ireland, without proof of the seal, or stamp, or signature, authenticating the same, or of the judicial or official character of the person appearing to have signed the same, shall be admitted in evidence to the same extent and for the same purposes in any court of justice of any of the British Colonies, or before any person having in any such colonies, by law or by consent of parties, authority to hear, receive, and examine evidence, without proof of the seal, or stamp, or signature, authenticating the same, or of the judicial or official character of the person appearing to have signed the same."

§§ 1557—
1559.

§ 1558. An affidavit purporting to be sworn before a Master Extraordinary of the old Court of Chancery in Ireland is by this Act³ admissible in evidence in this country, without proof of the signature or official character of such master.⁴

§ 1559. Moreover, clauses in "The Bankruptcy (Scotland) Act, 1856,"⁵ facilitate the proof, and regulate the effect, of certain proceedings under that statute, when tendered in evidence before

¹ 14 & 15 V. c. 99, § 10.

² *Ibid.* § 11.

³ § 10.

⁴ *In re Mahon's Trust*, 1852, 22 L. J. Ch. 75.

⁵ 19 & 20 V. c. 79.

§ 1559. English or Irish tribunals. One, relative to the mode of proving orders and decrees made under the Scotch Bankruptcy Law, has been cited in an earlier chapter of this work.¹ A further section² provides that "the warrant granting protection or liberation [to the debtor], or a copy thereof, certified by one of the Bill Chamber Clerks if it is granted by the Lord Ordinary, or by the Sheriff Clerk if it is granted by the Sheriff, shall protect or liberate the debtor from arrest or imprisonment in Great Britain and Ireland, and His Majesty's other dominions, for civil debt contracted previous to the date of sequestration; and all courts of justice and judges, and all officers and gaolers, shall be bound to give effect to such warrant; but such warrant of protection or liberation shall not be of any effect against the execution of a warrant of apprehension or imprisonment, in *meditatione fuge*, or *ad factum præstandum*, or for any criminal act." Others³ enact that the deliverance pronounced by the Lord Ordinary or the Sheriff, "discharging the bankrupt of all debts and obligations contracted by him, or for which he was liable at the date of the sequestration," "shall operate as a complete discharge and acquittance to the bankrupt in terms thereof, and shall receive effect within Great Britain and Ireland, and all His Majesty's other dominions." Further,⁴ the Act and warrant granted by the Sheriff in confirmation of the trustee of a sequestrated estate, which vests in the trustee the whole property of the debtor,⁵ is made "an effectual title to the trustee to perform the duties hereby imposed on him and shall be evidence of his right and title to the sequestrated estate for the purposes of this Act; and a copy of such act and warrant in favour of the trustee purporting to be certified by the Sheriff Clerk, and to be authenticated by one of the judges of the Court of Session, shall be received in all courts and places within England, Ireland, and His Majesty's other dominions, as *prima facie* evidence of the title of the trustee, without proof of the authenticity of the signatures or of the official character of the persons signing, and shall entitle the trustee to recover any property belonging or

¹ § 174, cited ante, § 13.

² § 47.

³ See §§ 140 and 147.

⁴ § 73. For the Form of the Act

and Warrant, see Sched. D. of the Statute.

⁵ § 102.

debt due to the bankrupt, and to maintain actions in the same way as the bankrupt might have done if his estate had not been sequestrated.”

§§ 1559,
1560.

§ 1560. Certain particular documents coming either from abroad, or from some place out of the jurisdiction of the court, may be proved in a special manner. Thus, under the Extradition Act, 1870,¹ “Depositions or statements on oath, taken in a foreign state, and copies of such original depositions or statements, and foreign certificates of or judicial documents stating the fact of conviction, may, if duly authenticated, be received in evidence in proceedings under this Act.” Moreover, by the same Act,² “Foreign warrants and depositions or statements on oath, and copies thereof, and certificates of or judicial documents stating the fact of a conviction, shall be deemed duly authenticated for the purposes of this Act, if authenticated in manner provided for the time being by law, or authenticated as follows:—

“(1.) If the warrant purports to be signed by a judge, magistrate, or officer of the foreign state where the same was issued;

“(2.) If the depositions, or statements, or the copies thereof purport to be certified under the hand of a judge, magistrate, or officer of the foreign state where the same were taken, to be the original depositions or statements, or to be true copies thereof, as the case may require; and

“(3.) If the certificate of or judicial document stating the fact of conviction purports to be certified by a judge, magistrate, or officer of the foreign state where the conviction took place; and

“(4.) If in every case the warrants, depositions, statements, copies, certificates, and judicial documents (as the case may be) are authenticated by the oath of some witness, or by being sealed with the official seal of the minister of justice, or some other minister of state: And all courts of justice, justices, and magistrates shall take judicial notice of such official seal, and shall admit the documents so authenticated by it to be received in evidence without further proof.”³

§ 1561. All the above provisions relating to depositions extend to affirmations taken in a foreign state, and to copies of such

¹ 33 & 34 V. c. 52, § 14.

² § 15.

³ See *R. v. Ganz*, 1882, 9 Q. B. D. 93.

§§ 1561—affirmations, as well as to depositions.¹ No objection to depositions duly authenticated under the Extradition Act, 1870,² can be urged on the ground that they were not taken in the presence of the accused or in relation to the particular charge.³

1563.

§ 1562. The Fugitive Offenders Act, 1881,⁴ again authorises the apprehension, committal, and return, of certain offenders, who have escaped from one part of His Majesty's dominions into another and enacts,⁵ that depositions, whether taken in the absence of the fugitive, or otherwise, and copies thereof, and official certificates of, or judicial documents stating facts, may, if duly authenticated, be received in evidence in proceedings under that Act," that is, in all proceedings before the committing magistrate. The statute gives minute directions as to what shall constitute due authentication of these several documents,⁶ and adds a proviso, that nothing in the Act shall authorise the reception of any of them in evidence "against a person upon his trial for an offence."⁷

§ 1562A. Under "Jervis' Acts" of 1848,⁸ proof should be made on oath of the handwriting of the justice issuing the original warrant,⁹ as a preliminary step towards giving jurisdiction to another magistrate to "back" such warrant. The Acts⁸ just mentioned contain provisions for apprehending offenders who escape from one part of the United Kingdom to another, or from one county or place in England to another, and empower any magistrate of the place to which an offender is supposed to have escaped to "back" the warrant for his apprehension.

§ 1563. Depositions taken either in India, respecting misdemeanors committed in that country, or in any place belonging to His Majesty out of the United Kingdom, respecting offences against the Acts for the abolition of the slave trade, under a writ of mandamus from the King's Bench Division, may be read on the trial in that Division of any indictment or information for

¹ 36 & 37 V. c. 60 ("The Extradition Act, 1873"), § 4.

² 33 & 34 V. c. 52.

³ *In re Counhay*, 1873, L. R. 8 Q. B. 410.

⁴ 44 & 45 V. c. 69.

⁵ § 29.

⁶ *Id.*

⁷ *Id.*

⁸ 11 & 12 V. cc. 42 and 43.

⁹ See §§ 11—15 of 11 & 12 V. c. 42 ("The Indictable Offences Act, 1848"), extended to Scotland by 55 & 56 V. c. 55, § 475; and § 3 of 11 & 12 V. c. 43 ("The Summary Jurisdiction Act, 1848").

these respective crimes, if they have been duly taken, and have also been returned to that Division, closed up and under the seal of two of the judges of the foreign court.¹

§§ 1563,
1564-5.

§§ 1564—5. The following section of the Merchant Shipping Act, 1894,² facilitates the proof of crimes committed either at sea or abroad, when a witness is at the time of trial out of the court's jurisdiction :—“(1.) Whenever, in the course of any legal proceedings instituted in any part of His Majesty's dominions before any judge or magistrate, or before any person authorised by law or by consent of parties to receive evidence, the testimony of any witness is required in relation to the subject-matter of such proceeding, then, upon *due proof*,³ if the proceeding is instituted in the United Kingdom, that the witness cannot be found in that Kingdom, or if in any British possession that he cannot be found in that possession, any deposition that the witness may have previously made on oath in relation to the same subject-matter before any justice or magistrate in His Majesty's dominions, or any British consular officer elsewhere, shall be admissible in evidence, provided that—(a.) If the deposition was made in the United Kingdom, it shall not be admissible in any proceeding instituted in the United Kingdom; and (b.) If the deposition was made in any British possession, it shall not be admissible in any proceeding instituted in that British possession; and (c.) If the proceeding is criminal, it shall not be admissible unless it was made in the presence of the person accused. (2.) A deposition so made shall be authenticated by the signature of the judge, magistrate, or consular officer, before whom the same is made; and the judge, magistrate or consular officer shall certify, if the fact is so, that the accused was present at the taking thereof. (3.) It shall not be necessary in any case to prove the signature or official character

¹ 13 G. 3, c. 63 (“The East India Company's Act, 1772”), § 40; 6 & 7 V. c. 98 (“The Slave Trade Act, 1843”), § 4. See, also, ante, §§ 500—505. As to how far it is necessary to prove that they have been duly taken and returned, see *R. v. Douglas*, 1846, 16 L. J. Q. B. 417.

² 57 & 58 V. c. 60, § 691. As to the proof, admissibility, and effect of

depositions taken in French ports with respect to offences under “The Sea Fisheries Act, 1868,” see 31 & 32 V. c. 45, § 61, and Sched. I. Art. 28; 46 & 47 V. c. 22, § 30, sub-sect. 2 (d); and 48 & 49 V. c. 70.

³ See *R. v. Conning*, 1868, 11 Cox, C. C. 134; *R. v. Anderson*, 1868, 11 Cox, C. C. 154.

§§ 1564-5 of the person appearing to have signed any such deposition;
—1567-8. and in any criminal proceeding a certificate under this section

shall, unless the contrary is proved, be sufficient evidence of the accused having been present in manner thereby certified.¹

(4.) Nothing herein contained shall affect any case in which depositions taken in any proceeding are rendered admissible in evidence by any Act of Parliament, or by any Act or ordinance of the Legislature of any colony, so far as regards that colony, or interfere with the power of any colonial Legislature to make those depositions admissible in evidence, or to interfere with the practice of any court in which depositions not authenticated as hereinbefore mentioned are admissible.”

§ 1566. R. S. C., 1883, Ord. XXXVIII., R. 6,² after regulating the mode of swearing and taking examinations, affidavits, and other documents,³ whether in His Majesty's foreign dominions, or in any foreign parts, provides that the seal or signature of the court, judge, notary, consul, or other person, attached⁴ to such documents, shall be *judicially noticed*.⁵

§§ 1567—8. The Commissioners for Oaths Act, 1889,⁶ enacts,⁷ that “every British ambassador, envoy, minister, charge d'affaires, and secretary of embassy or of legation, exercising his functions in any foreign country, and every British consul-general, consul, vice-consul, acting consul, pro-consul, and consular agent, exercising his functions in any foreign place, may, in that country or place, administer any oath, and take any affidavit, and also do any notarial act which any notary-public

¹ See *R. v. Stewart*, 1876, 13 Cox, C. C. 296.

² Cited ante, § 12.

³ Under these general words, a power of attorney executed in British Honduras in the presence of a notary-public, has been proved in a Court of Equity by the production of the notary's certificate under his hand and official seal: *Armstrong v. Stockham*, 1835, 24 L. J. Ch. 176. See, also, *Hayward v. Stephens*, 1867, 36 L. J. Ch. 135.

⁴ In *Haggitt v. Ineff*, 1854, 24 L. J. Ch. 120 (followed by *Cooke v. Wilby*, 1884, 25 Ch. D. 769; see, also, cases cited in last note), the Lords Justices received an affidavit,

sworn in the United States before, and attested by, a notary-public, to which was appended a certificate of the British Consul at New York, stating that the notary held that office, and that his signature was entitled to credit. See, also, *Savage v. Hutchinson*, 1855, 24 L. J. Ch. 232; *Levitt v. Levitt*, 1865, 2 H. & M. 626; and *Lyle v. Ellwood*, 1872, L. R. 19 Eq. 98. But see *In re Earl's Trusts*, 1858, 4 K. & J. 300, cited ante, note ³ to p. 10.

⁵ See, also, 46 & 47 V. c. 52, § 135, and r. 50 of Bkptcy. Rules, cited ante, § 1552.

⁶ 52 V. c. 10.

⁷ § 6.

can do within the United Kingdom; and every oath, affidavit, and notarial act, administered, sworn, or done by or before any such person, shall be as effectual as if duly administered, sworn, or done by or before any lawful authority in any part of the United Kingdom."¹

§ 1569. The object of all the statutes just mentioned not being to abrogate the old law, but to facilitate the administration of oaths abroad, strict compliance with them is apparently not always necessary, but it will seemingly suffice if an affidavit taken abroad is sworn before some functionary able to administer an oath in his own country.²

§ 1570. In general, before any document, whether an original, or a copy purporting to evidence a judicial proceeding, can be accepted as satisfactory proof of such proceeding, it must appear that the record or entry of such proceeding has been *finally completed*. Thus, to prove the finding of an indictment, either at the Assizes or Sessions, it will not be sufficient to produce the indictment itself indorsed as a true bill, or the minute-book of the Clerk of the Peace, or other officer of the court, in which that fact is entered, but the record must be formally drawn up, and proved in the regular way;³ a judgment, whether interlocutory or final, of any Division of the High Court, cannot be proved by producing the minutes, from which it is to be made up, for, until it is actually made up, the judgment is no record;⁴ and a verdict cannot, in general, be proved by putting in the *Nisi Prius* record with the *postea* indorsed, but a copy of the judgment rendered upon it must be produced; for it may be that the judgment was arrested, or that a new trial was granted,⁵ though

¹ See *In re Lambert*, 1866, L. R. 1 P. & D. 138; overruling *In re Barnard*, 1862, 31 L. J. P. & M. 89.

² *Kevan v. Crawford*, 1876, 45 L. J. Ch. 658; *In the goods of Fawcus*, 1884, 9 P. D. 241; *Brittlebank v. Smith*, 1884, 50 L. T. 491.

³ *R. v. Smith*, 1828, 8 B. & C. 341; *Porter v. Cooper*, 1834, 6 C. & P. 354; *Cooke v. Maxwell*, 1817, 2 Stark. B. 183; *R. v. Thring*, 1832, 5 C. & P. 507.

⁴ *Godefroy v. Jay*, 1827, 3 C. & P. 192; *R. v. Bellamy*, 1824, Ry. & M. 171; *Lee v. Meacock*, 1805, 5 Esp.

177; *R. v. Birch*, 1842, 3 Q. B. 431; *Ayrey v. Davenport*, 1807, 2 Bos. & P. N. R. 474; *R. v. Robinson*, 1839, 1 Crawf. & D. C. C. 329 (Ir.). See *Fisher v. Dudding*, 1841, 9 Dowl. 872.

⁵ B. N. P. 234; *Pitton v. Walter*, 1718, 1 Str. 162; *Lee v. Gansel*, 1774, 1 Cowp. 1; *Fitch v. Smallbrook*, 1661, T. Raym. 32; *Fisher v. Kitchingman*, 1742, Willes, 367; *Gillespie v. Cumming*, 1841, Long. & T. 181 (Ir.); *Jameson v. Leitch*, 1842, Milw. 688 (Ir.); *Holt v. Miers*, 1839, 9 C. & P. 195. This rule seems to

§§ 1570— if the record itself be produced from the proper custody, no
1572. objection can be taken to it as not yet having been filed.¹

§ 1571. The formal record does not necessarily mean (as has sometimes been imagined)² a record enrolled *at full length on parchment*. In the Superior Courts, indeed, a practice of making up a record in this way has long been established, but in several other courts a less formal method of making up records, and entering proceedings, prevails. For instance, in the House of Lords itself, the minutes of a judgment on the Journals constitute the judgment itself, and a judgment of such House may, consequently, be proved, either by an examined copy of the minute,³ or by producing a copy of the Journal in which it is entered, purporting to be printed by the authorised printer;⁴ and the orders of Quarter Sessions respecting the removal of paupers may be proved by the paper book, in which the proceedings of the court have been entered by the clerk of the peace, or by a copy of it, if such minutes sufficiently disclose the jurisdiction of the court, and it be shown that, in practice, no more formal record is kept⁵—though, if this last fact be not proved, or if the jurisdiction of the court do not appear in the minutes,⁶ neither the book nor the copy can be received.⁷

§ 1572. In much the same way, in all proceedings civil or criminal before the Civil Bill Courts in Ireland, the entry in the clerk of the peace's book of a decree or dismissal, is⁸ conclusive evidence of such a judgment having been pronounced; the proceedings of the ecclesiastical courts may be proved by the minute books in which they are entered, or by copies of such books, if it be shown that in practice they are never reduced into a more formal shape;⁹ and the same rule will prevail with

have been relaxed in two N. P. cases : *Foster v. Compton*, 1818, 2 Stark. R. 364; and *Garland v. Scoones*, 1798, 2 Esp. 648. Sed qu. See post, § 1573, as to some exceptions to the rule.

¹ *R. v. Shaw*, 1823, R. & R. 526.

² See 3 Bl. Com. 24; Co. Lit. 260 a.

³ *Jones v. Randall*, 1774, 1 Cowp. 17.

⁴ 8 & 9 V. c. 113, § 3; cited ante, § 7.

⁵ *R. v. Yeoveley*, 1838, 8 A. & E.

818. Orders of justices forming a highway district are provable by copies certified by the clerk of the peace: 27 & 28 V. c. 101, § 12.

⁶ If, for instance, the caption be omitted.

⁷ *R. v. Ward*, 1834, 6 C. & P. 366; explained in *R. v. Yeoveley*, 1838, 8 A. & E. 818; *Giles v. Siney*, 1864, 11 L. T. 310.

⁸ By statute 27 & 28 V. c. 99, § 57, Ir.

⁹ *Houliston v. Smyth*, 1825, 2 C.

respect to orders and convictions by the Metropolitan Police Magistrates, when it is desired to prove a previous order or conviction in the same court,¹ and to the judgments and other proceedings of courts-baron,² sheriffs' courts,³ mayors' courts,⁴ and other courts of inferior jurisdiction.⁵ It seems, indeed, that the judgments of such courts of inferior jurisdiction as are not courts of record may be proved by the officer of the court, or any other competent person, if it appear that, in fact, no entry of them has been made in any official book.⁶ Therefore, where a railway Act provided that certain verdicts and judgments as to claims for compensation for land taken after assessment by a sheriff's jury should be deposited with the clerk of the peace for the county among the records, and should be deemed records, it was held that, on proof of non-compliance with this direction, parol evidence of such a verdict, and of the grounds on which it proceeded, might be given, and the under-sheriff was called for this purpose.⁷

§§ 1572,
1573.

§ 1573. There are, however, *three exceptions* to the rule requiring the record or judicial entry to be formally completed, before either the original of such judgment or a copy of it can be admitted in evidence. First, to show any particular court that some trial has been held or other proceeding has occurred before *the same* court while sitting under the same commission, a minute of the former proceeding will be admitted in lieu of the record, because, in this case, the formal record cannot be presumed to have been made up.⁸ Secondly, the same course will be allowed where, in consequence of some ulterior proceedings, the record cannot, at the time when the evidence is required, have been regularly completed. For instance, on an indictment for perjury committed on a trial at Nisi Prius,⁹ the previous trial

& P. 24; *R. v. Hains*, 1695, Comb. 337 (Ld. Holt).

¹ *London School Board v. Harvey*, 1879, 4 Q. B. D. 451; *Commissioners of Police v. Donovan*, [1903] 1 K. B. 895.

² *Dawson v. Gregory*, 1845, 14 L. J. Q. B. 286.

³ *Arundell v. White*, 1811, 14 East, 218.

⁴ *Fisher v. Lane*, 1771, 2 W. Bl. 834.

⁵ *R. v. Hains*, 1695, Comb. 337.

⁶ *Dyson v. Wood*, 1824, 3 B. & C. 449.

⁷ *Manning v. E. Cos. Rail. Co.*, 1843, 13 L. J. Ex. 265.

⁸ *R. v. Tooke*, 1794, 25 How. St. Tr. 446; recognised in *R. v. Smith*, 1828, 8 B. & C. 341; *R. v. Robinson*, 1839, 1 Crawf. & D. C. C. 329 (Ir.); *R. v. Reilly*, 1843, Ir. Cir. R. 795.

⁹ *R. v. Browne*, 1829, M. & M. 319.

**§§ 1573,
1574.**

at Nisi Prius record may be proved, without the production of more formal evidence, by the production of a mere minute by the associate, and proof by him that a motion for a new trial is pending, and that until such motion is disposed of no more formal record can be made up. Thirdly, where the evidence is merely to show that a certain judicial proceeding has taken place (as, for instance, that a trial has been had, a verdict given, or a writ issued) without regard to the facts in dispute at such trial, or found by the jury by such verdict, or mentioned in such writ, and has no reference to any ulterior proceedings, the record need not be formally drawn up.¹ Accordingly, the postea indorsed on a Nisi Prius record will be sufficient evidence of a trial, to let in the testimony of a witness since deceased,² and perhaps, to support an indictment against a witness for perjury;³ where the fact that a writ has issued is mere matter of inducement, it may be proved by producing the writ, though it has not been returned, and is, consequently, not a record;⁴ and on a trial at the Central Criminal Court for perjury committed on a trial at the same court some six months before, the production by the officer of the court of the caption, the indictment with the indorsement of the prisoner's plea, the verdict, the sentence, and the minutes of the trial as made by the officer, was held⁵ to be sufficient evidence of the trial, without the production of the record, or of any certificate of it.⁶

§ 1574. It is difficult to lay down any distinct rule as to how much of the proceedings referred to by it *must be given in evidence* on proving a record, since the practice on this differs widely

¹ B. N. P. 234; *Pitton v. Walter*, 1718, 1 Str. 162; *Fisher v. Kitchingman*, 1742, Willes, 367; *Barlow v. Dupuy*, 1823, 1 Mart. N. S. 442 (Am.).

² *Pitton v. Walter*, 1718, Willes, 367.

³ *R. v. Browne*, 1829, M. & M. 319; *R. v. Coppard*, 1827, M. & M. 118. See *R. v. Page*, 1798, 2 Esp. 649 n.; and *R. v. Gordon*, 1842, Car. & M. 410, where Lord Denman held that an allegation in an indictment for perjury that judgment was "entered up" in an action was proved by producing from the judg-

ment office the book in which the inscription was entered. But, in *R. v. Thring*, 1832, 5 C. & P. 507; and *R. v. Robinson*, 1839, 1 Craf. & D. C. C. 329 (Ir.), it was held that, on an indictment for perjury in a prosecution, the record of the former trial must be made up.

⁴ B. N. P. 234.

⁵ *R. v. Newman*, 1852, 2 Den. 390. See post, §§ 1612, 1613.

⁶ Given either under § 13 of 14 & 15 V. c. 99 ("The Evidence Act, 1851"), or § 22 of 14 & 15 V. c. 100 ("The Criminal Procedure Act, 1851").

according to the *object* for which the evidence is tendered. It may, however, be stated broadly, that where the object is merely to prove the existence of the record in question, that fact may be established by producing the document alone; but if the record be relied upon as proof of any particular facts stated therein, or adjudicated thereby, all the proceedings necessary, either to render valid, or to explain, such document must, generally, be put in evidence.

§§ 1574
—1575a

§ 1574A. Accordingly, if a *decree in Chancery* is offered, merely to prove that it was in fact made, here, as in the case of verdicts,¹ no proof of any other proceeding is required;² but if a party intends to avail himself of a decree, as an adjudication upon the subject-matter, he must generally prove, not only the decree, but also the pleadings upon which it was founded; since, without such proof, it may be impossible either to understand the decree itself, or to ascertain with certainty what disputed questions it decided.³ And it has, indeed, been even contended that it is necessary that the depositions referred to in a decree should also be read as part of the record; but it has been decided that this need not be done.⁴

§ 1575. On like principles, *judgments of the Ecclesiastical Court* cannot be made evidence without producing the libel and answer, and the defensive allegations;⁵ and on appeals from judgments of such courts being given in evidence, the process of appeal, that is, the transcript of the proceedings sent from the court below, must also be produced (so as to show what points the Court of Appeal had before it).⁶

§ 1575A. Rules similar to the above also apply to sentences in

¹ Ante, § 1573.

² *Jones v. Randall*, 1774, 1 Cowp. 18; *B. N. P.* 235; *Blower v. Hollis*, 1833, 1 C. & M. 393, where it was held that an order for an attachment for not paying costs of an equity suit was alone *prima facie* evidence that a suit had been pending.

³ *Blower v. Hollis*, 1833, 1 C. & M. 393; *Leake v. M. of Westmeath*, 1841, 2 M. & Rob. 397; *Attwood v. Taylor*, 1840, 1 M. & Gr. 289. Where the decree fully recites the pleadings the reasons mentioned above do not apply; and it has been more than

once held that in this case the production of such decree will alone be sufficient: *Wheeler v. Lowth*, 1710, *Com. Dig.* tit. *Ev. C.* 1; *Wharton Peer.*, 1845, 12 Cl. & Fin. 301 (H. L.).

⁴ *Laybourn v. Crisp*, 1838, 4 M. & W. 320.

⁵ *Leake v. M. of Westmeath*, 1841, 2 M. & Rob. 394; virtually overruling *Stedman v. Gooch*, 1793, 1 Esp. 6.

⁶ *Leake v. M. of Westmeath*, 1841, 2 M. & Rob. 394.

**§§ 1575
—1577.**

the Admiralty Division of the High Court, and to judgments in courts-baron and other inferior courts.¹

§ 1575B. Authorities, however, differ as to whether an adjudication by the former Insolvent Debtors Court for the discharge of a prisoner can be received as evidence of his insolvency, without putting in his petition and schedule; though, on strict principle, such evidence would seem to be required.²

§ 1576. Generally, *depositions in Chancery*, taken under the old system, cannot be read, without previous proof of the bill and answer, in order to show that a cause was depending, who were the parties to it, and what was the subject-matter in issue; for, if no cause were depending, the depositions are but voluntary affidavits; and if there were one, it is further necessary to show that it was against the same parties or those claiming in privity with them, and on the same subject.³ The bill and answer do not, however, by being so put in, become evidence for the jury, and consequently the opposite counsel has no right to read or refer to them in his address; but the judge only looks at them, for the purpose of determining whether the depositions are evidence, by seeing what was in issue in the suit.⁴ Moreover, no proof of the bill or answer is necessary, where the deposition is used against the deponent as his own admission, or for the purpose of contradicting him as a witness.⁵

§ 1577. A party who relies upon depositions taken in England prior to 1852,⁶ or to 1867,⁷ must read the interrogatories as well as the answers, unless he can prove that the former are lost or destroyed,⁸ and it seems that he must also read as part of his case the whole depositions, including the cross-interrogatories and

¹ Com. Dig. tit. Ev. C. 1.

² In *M'Kee v. Farnam*, 1841, 2 Crawf. & D. C. C. 209 (Ir.), Torrens, J., rejected the adjudication; but in *Brennan v. Dillane*, 1843, Ir. Cir. R. 853, Ball, J., admitted it without the petition, though he required the production of the schedule. This last decision is said (*id.*) to have been subsequently followed by Jackson, J.

³ See *Laybourn v. Crisp*, 1838, 4 M. & W. 326; *Blower v. Hollis*, 1833, 1 C. & M. 396 (Maule, *argu.*); 2 Ph. Ev. 210; B. N. P. 240;

Nightingal v. Devisme, 1770, 5 Burr. 2594.

⁴ *Chappell v. Purday*, 1845, 14 L. J. Ex. 258.

⁵ *Highfield v. Peake*, 1827, M. & M. 109.

⁶ When 15 & 16 V. c. 86 ("The English Chancery Act, 1852") passed.

⁷ When 30 & 31 V. c. 44 ("The Chancery (Ireland) Act, 1867") passed.

⁸ *Rowe v. Brenton*, 1828, 8 B. & C. 765.

answers thereto.¹ Depositions taken since those dates, whether under the present system,² or that which immediately preceded it, are not open to these niceties.³ The oral examination of the witness is at present "taken down in writing by or in the presence of the examiner, not ordinarily by question and answer, but so as to represent as nearly as may be the statement of the witness."⁴ Such depositions to be evidence must, however—except under special circumstances⁵—be written by or in the presence of the examiner, authenticated by his signature, and have been transmitted by him to the Central Office to be filed.⁶ Proof that these regulations have been complied with must be forthcoming if the admissibility of depositions be disputed; but the original documents need not be produced, and it will suffice to put in evidence either examined copies of them,⁷ or copies certified as true copies by the officer to whose custody the originals are intrusted.⁸ The original depositions, and not certified copies only, must, however, have been transmitted and filed.⁹

§ 1578. The depositions having been filed are to be printed.¹⁰ When depositions have been filed before issue joined notice in writing of an intention to use them must be given within one month after issue joined, "or within such longer time as may be allowed by special leave of the court or a judge," by the party intending to use the same to his opponent.¹¹

§ 1579. The original depositions having been signed by the examiner are, as already stated, to be transmitted by him to the Central Office and there filed. They may be sent by post under seal, the envelope being addressed to the "Senior Master of the Supreme Court of Judicature, Central Office, Royal Courts of Justice," or to the "Senior Registrar of the Probate, Divorce and

¹ *Temperley v. Scott*, 1832, 5 C. & P. 341.

² R. S. C. 1883, Ord. XXXVII. r. 5, cited ante, § 504.

³ *Fleet v. Perrins*, 1868, L. R. 3 Q. B. 536.

⁴ R. S. C. 1883, Ord. XXXVII. r. 12. The Irish Act adds the words, "and in the first person."

⁵ *Bolton v. Bolton*, 1876, 2 Ch. D. 217; *Stobart v. Todd*, 1854, 23 L. J. Ch. 956; *Cooper v. Macdonald*, 1867, 36 L. J. Ch. 304.

⁶ Ord. XXXVII. r. 16.

⁷ *Fleet v. Perrins*, 1868, L. R. 3 Q. B. 536.

⁸ 30 & 31 V. c. 44, § 102, Ir.; 14 & 15 V. c. 99 ("The Evidence Act, 1851"), § 14, cited post, § 1599; *Reeve v. Hodson*, 1853, 10 Hare, App. XIX.

⁹ *Clay v. Stephenson*, 1837, 7 A. & E. 185; *Atkins v. Palmer*, 1821, 4 B. & Ald. 377.

¹⁰ Ord. LXVI. rr. 3, 5, & 7.

¹¹ Ord. XXXVII. r. 24.

§§ 1579—Admiralty Division, Somerset House," as the case may be. If
1582. posted in England no postage need be paid. When evidence is taken under the authority of a Letter of Request, the form of request determines the person to whom the depositions are to be returned—usually the Secretary of State for Foreign Affairs. Depositions of a witness must be transmitted complete and not in parts.

§ 1580. It is provided by Rule 18 of Ord. XXXVII. that "except where by the order otherwise provided or directed by the court or a judge," no deposition is to be given in evidence, except by consent, unless the court is satisfied that the deponent is dead, beyond the jurisdiction of the court or unable from sickness or other infirmity to attend the hearing. It is not unusual for the judge in making the order for an examination to add a direction to the effect that proof of the absence of the witnesses to be examined from this country at the time of trial may be given by the affidavit of a solicitor or agent.¹ Failing such a direction the party against whom a deposition is offered in evidence may insist upon proof being given in accordance with the rule. The evidence must be given by a person who can speak to the fact of his own knowledge.² It is sufficient to prove that the witness whose deposition is tendered has been seen to start for Australia,³ but not that the witness was seen the night before the trial on an outward bound vessel waiting for the captain to come on board.⁴ Less strict evidence that a witness is abroad is required in a case where a witness has been examined abroad than in a case where he has been examined in England on the ground that he was about to go abroad.

§ 1581. The mode of proving the *examination* of prisoners, and *informations* or *depositions* of witnesses, taken by justices or coroners, in *criminal* cases, has been explained.⁵

§ 1582.⁶ Returns to *inquisitions* post mortem, and other inquiries, surveys, extents, and the like, cannot *strictly*⁷ be proved,

¹ See the forms of "long order" for a commission contained in App. K. (No. 37), to the R. S. C., 1883.

² *Robinson v. Markis*, 1841, 2 M. & Rob. 375.

³ *Varicas v. French*, 1849, 2 C. & K. 1008.

⁴ *Carruthers v. Graham*, 1841,

Car. & M. 5.

⁵ As to examinations, ante, §§ 888—901; as to depositions, ante, §§ 479—494.

⁶ Gr. Ev. § 515, in part.

⁷ As to when this rule will be relaxed, see post, § 1585.

without reading the commissions on which they depend ;¹ unless in cases of general concernment, when the commission will be regarded as a thing of such public notoriety as not to require proof.²

§§ 1582,
1583.

§ 1583. To prove an *award*, it is not only necessary to produce and prove the due execution of that instrument, but the submission to reference must also be proved ; for otherwise the authority of the arbitrator to decide the question between the parties does not appear.³ If the submission be by a written agreement, its execution by all the parties, including the party relying upon it, must be strictly proved ;⁴ and that, too, though it has been made a rule of court, pursuant to one of its terms.⁵ If, however, the arbitrator has been appointed by rule of court, judge's order, or order of *Nisi Prius*, in an action,⁶ then, on proving the award, and producing the rule or order of reference, a sufficient *prima facie* case will be made out ; and it will not be necessary to show, by producing the record in the original action, or otherwise, what specific matters were actually referred.⁷ Where the submission contains a power to appoint an umpire, or to enlarge the time for making the award, and it has been acted upon, proof must be given of the instrument appointing the umpire, or enlarging the time ; and neither will a mere recital in the award be evidence of these facts,⁸ nor can the appointment of an umpire be proved by showing that he has undertaken the duties belonging to his office, and has actually signed the award.⁹ The executing an award is a judicial act, and, therefore, proof should in all cases where more than one arbitrator is appointed, be given, that the signing by the joint arbitrators took place in the presence of each other ;¹⁰ or if,

¹ *Evans v. Taylor*, 1838, 7 A. & E. 617 ; B. N. P. 228 ; *Newburgh v. Newburgh*, 1712, 3 Bro. P. C. 553 ; *Hubb. Ev. of Suc.* 589, 590.

² *Sir Hugh Smithson's case*, undated (*Ld. Hardwicke*), cited B. N. P. 228, 229.

³ *Ferrer v. Oven*, 1827, 7 B. & C. 427 ; *Antram v. Chace*, 1812, 15 East, 209 ; *Brazier v. Jones*, 1828, 8 B. & C. 124. Arbitrations are now regulated by "The Arbitration Act, 1889" (52 & 53 V. c. 49), which see generally on the subject.

Cases cited in last note.

⁴ *Berney v. Read*, 1845, 14 L. J. Q. B. 247.

⁵ 3 & 4 W. 4, c. 42, § 39 ; 3 & 4 V. c. 105 ("The Debtors (Ireland) Act, 1840"), § 63.

⁷ *Gisborne v. Hart*, 1839, 8 L. J. Ex. 197 ; recognised in *Dresser v. Stansfield*, 1845, 15 L. J. Ex. 274.

⁸ *Still v. Halford*, 1814, 4 Camp. 19 ; *Davis v. Vass*, 1812, 15 East, 97.

⁹ *Still v. Halford*, 1814, 4 Camp. 19.

¹⁰ *Stalworth v. Inns*, 1844, 14 L. J. Ex. 81 ; *Wright v. Graham*, 1848,

§§ 1583— under the terms of reference, the award is to be good although
 1585. executed by a less number than all the arbitrators, that the arbitrator, who has not signed the instrument, had notice to attend the execution, and omitted or refused to do so.¹

§ 1584. A less rigid amount of proof of *awards by public officers* than is called for in ordinary cases will sometimes be deemed sufficient, and in the absence of evidence of a subsequent usage inconsistent with the award, the maxim, *omnia præsumuntur rite esse acta*, will be held to apply.² Accordingly, where commissioners, named in an Inclosure Act, and thereby authorised to stop up roads, if two justices made an order to that effect, published their award stopping up a certain public footpath in which such order of justices was recited, this recital was held sufficient *primâ facie* evidence of a valid order, on proof of an ineffectual search for the instrument itself, and it was also held, that the award must be taken to have been rightly made, unless some proof of enjoyment inconsistent with it could be given.³ Following the principle of this case, awards made and confirmed by commissioners under many of the General Inclosure Acts⁴ are by statute expressly rendered *conclusive* evidence of a compliance with those Acts, and of all necessary notices and consents; and everything⁵ specified in such awards is binding and conclusive on all persons.

§ 1585. The strict rules of evidence are sometimes relaxed in proving *ancient* records. Thus, a document, purporting to be an exemplification of a commission issued by Queen Elizabeth, and

18 L. J. Ex. 29; *Eads v. Williams*, 1854, 24 L. J. Ch. 531; *Lord v. Lord*, 1855, 26 L. J. Q. B. 34.

¹ *White v. Sharp*, 1844, 13 L. J. Ex. 215; *Wright v. Graham*, 1848, 18 L. J. Ex. 29. In *re Beck and Jackson*, 1857, 1 C. B. N. S. 695.

² *R. v. Haslingfield*, 1814, 2 M. & Selw. 558; *Doe v. Gore*, 1837, 2 M. & W. 321; *Doe v. Mostyn*, 1852, 21 L. J. C. P. 178; *Heysham v. Forster*, 1829, 5 M. & R. 277. As to when such awards may be proved by certified copies, see post, § 1607.

³ *Manning v. East. Con. Rail. Co.*, 1843, 13 L. J. Ex. 265; *Williams v. Eyton*, 1858, 27 L. J. Ex. 176.

⁴ 6 & 7 W. 4, c. 115; 3 & 4 V. c. 31; 8 & 9 V. c. 118 ("The Inclosure Act, 1845"); 9 & 10 V. c. 70 ("The Inclosure Act, 1846"); 10 & 11 V. c. 111 ("The Inclosure Act, 1847"); 11 & 12 V. c. 99 ("The Inclosure Act, 1848").

⁵ That is, all matters of fact; and an award under the Act is not conclusive as to legal title or the jurisdiction of the Commissioners: *Jacomb v. Turner*, [1892] 1 Q. B. 47. See also, 3 & 4 V. c. 31, § 1; and 8 & 9 V. c. 118, §§ 104, 105, 157. See 57 & 58 V. c. 60, § 137 (2), as to submissions to, and awards by, shipping masters.

produced from the proper place of deposit, has been read, without any evidence of its being a true copy, though no seal was affixed to it, and the state of the parchment was such as to render it impossible to say whether the Great Seal had ever been appended;¹ ancient depositions may be read without putting in the interrogatories,² or the bills and answers to which they relate,³ or the commissions under which they were taken,⁴ if it be proved that search has been unsuccessfully made for these documents; on like proof, old answers are received in evidence, though the bills be not forthcoming; and so are ancient extents, surveys, or returns to inquisitions, coming from the proper custody, and bearing internal evidence of having been taken under due authority (especially when tendered as evidence of reputation), notwithstanding that the commissions on which their legality depended cannot be found.⁵ Such documents, however, where they contain no internal evidence of authenticity, cannot be read without the production of the commissions from the proper depository;⁶ nor then, if there appears to have been any excess of authority, or other such irregularity in the proceedings as to render them not only voidable but void.⁷ After proof that a record has been destroyed then, whether it be ancient or modern, it is of course allowable to show its contents (as in the case of any other document) by secondary evidence.⁸

§ 1586. The mode of proving certain documents, which, though emanating from courts of justice, are not strictly records, or such proceedings, as, for the most part, are capable of being primarily proved by means of copies, must now be noticed. First, *writs of execution and warrants of commitment*, until they are returned, must be proved by actual production, though, after their return,

§§ 1585,
1586.

¹ *May. of Beverley v. Craven*, 1838, 2 M. & Rob. 140.

² *Rowe v. Brenton*, 1828, 8 B. & C. 737.

³ *Byam v. Booth*, 1814, 2 Price, 234, n.

⁴ *Bayley v. Wylie*, 1807, 6 Esp. 85.

⁵ *Rowe v. Brenton*, 1828, 8 B. & C. 765; *Doe v. Roberts*, 1844, 13 M. & W. 520, 531; *Vicar of Kellington v. Trinity College*, 1747, 1 Wils. 170; *Alcock v. Cook*, 1829, cited 2 Ph. Ev.

216, n. 2; *Anderston v. Magawley*, 1726, 3 Bro. P. C. 588; *Gabbett v. Clancy*, 1844-5, 8 Ir. L. R. 299.

⁶ *Evans v. Taylor*, 1838, 7 A. & E. 617. See *D. of Beaufort v. Smith*, 1849, 19 L. J. Ex. 97; *Freeman v. Read*, 1863, 32 L. J. M. C. 226.

⁷ *Vaux Barony*, 1836, Min. Ev. 67; *Powis Barony*, 1731, cited *Cruise*, Dign. c. 6, § 60; *Leighton v. Leighton*, 1720, 1 Str. 308; *Hubb. Ev. of Succ.* 590.

⁸ *Ante*, §§ 428 et seq.

§ 1586.

they become matters of record, and are, consequently, provable by copies.¹ Writs of summons in the High Court may be proved by the production, either of the originals, or of copies filed by the officer of the court,² or, if the originals be lost by copies, authenticated by the court or a judge,³ and any one of these documents will furnish proper evidence of the institution of the action to which they relate.⁴ When writs of summons or writs of execution in the High Court have been renewed,⁵ the fact of renewal may be proved by the production of the respective writs, provided they purport to be marked with the seal of the court, showing them to have been duly renewed.⁶ The renewal of a writ of execution may also be proved by a written notice to the sheriff signed by the party or his solicitor, and bearing the seal of the court with the day, month, and year of renewal, impressed thereon.⁷ Next, a *certificate of a judge*, if not endorsed on a record, cannot, it seems, be proved by a copy, but the original must be produced, when the courts will judicially notice the signature, if it purport to be that of one of the judges of the Supreme Court, or of one of the equity or common law judges of the old Superior Courts at Westminster.⁸ But a judge's *order* in any cause or matter may now be proved and enforced in the same manner as a judgment to the same effect.⁹ The *pleadings* in an action may be proved either by producing the originals, or by means of the copies filed¹⁰ with the officer of the court.¹¹ And all copies, certificates, and other documents appearing to be sealed with a seal of the Central Office are presumed to be office copies or certificates or other documents issued from the Central Office, and if duly stamped may be received in evidence, and no signature or other formality, except the sealing with a seal of the Central Office, is required

¹ B. N. P. 234. If the writ is the gist of the action it must be returned. *Id.* As to inhibitions, citations, monitions, &c., arising out of appeals to the Privy Council, see 6 & 7 V. c. 38 ("The Judicial Committee Act, 1843"), § 9, amended by 53 & 54 V. c. 27.

² Under R. S. C., Ord. V. rr. 12, 13.

³ Under Ord. VIII. r. 3.

⁴ R. v. Scott, 1877, 2 Q. B. D.

415.

⁵ Ord. VIII. r. 1; Ord. XLII. r. 20.

⁶ See Ord. VIII. r. 2. And see, also, Ord. XLII. r. 21.

⁷ Ord. XLII. rr. 20, 21.

⁸ 8 & 9 V. c. 113, § 2, cited ante, § 7.

⁹ Ord. XLII. r. 24.

¹⁰ Under Ord. XLI. r. 1.

¹¹ R. v. Scott, 1877, 2 Q. B. D. 415. See, also, Ord. XXXVI. r. 30.

for the authentication of any such copy, certificate, or other document.¹ §§ 1586, 1586a.

§ 1586A. In the High Court the most important rules as to the service of proceedings therein, and as to the proof of such service, are as follows:—First, by Ord. LXIV., R. 11, “Service of pleadings, notices, summonses, orders, rules, and other proceedings, shall be effected *before the hour of six in the afternoon, except on Saturdays*, when it shall be effected before the hour of *two* in the afternoon. Service effected after six in the afternoon on any week day except Saturday, shall, for the purpose of computing any period of time subsequent to such service, be deemed to have been effected on the following day. Service effected after two in the afternoon on Saturday shall, for the like purpose, be deemed to have been effected on the following Monday.” By R. 12, “In any case in which any particular number of days, not expressed to be clear days, is prescribed by these Rules, the same shall be reckoned exclusively of the first day and inclusively of the last day.” By R. 2 of the same Order, “Where any limited time less than six days from or after any event is appointed or allowed for doing any act or taking any proceeding, Sunday, Christmas Day, and Good Friday shall not be reckoned in the computation of such limited time”; and by R. 3, “When the time for doing any act or taking any proceeding expires on a Sunday, or other day on which the offices are closed, and by reason thereof such act or proceeding cannot be done or taken on that day, such act or proceeding shall, as regards the time of doing or taking the same, be held to be duly done or taken on the day on which the offices shall next be open.” By Ord. LXVII., R. 1, “Except in the case of an order for attachment, it shall not be necessary to the regular service of an order that the original order be shown if an office copy of it be exhibited.” And by R. 2, “All writs, notices, pleadings, orders, summonses, warrants, and other documents, proceedings, and written communications, in respect of which personal service is not requisite, shall be sufficiently served if *left* within the prescribed hours,² at the address for service of the person to be served as defined by Ords. IV. and

¹ Ord. LXI. r. 7.

See R. 11, cited above.

§ 1586a. XII., with any person resident at or belonging to such place;" while by R. 3, "*Notices sent from any office of the Supreme Court may be sent by post*; and the time at which the notice so posted would be delivered in the ordinary course of post shall be considered as the time of service thereof, and the posting thereof shall be a sufficient service." It is also provided, in the same Order, by R. 4, that "Where no appearance has been entered for a party, or where a party or his solicitor, as the case may be, *has omitted to give an address for service as required by Ords. IV. and XII.*, all writs, notices, pleadings, orders, summonses, warrants, and other documents, proceedings, and written communications, in respect of which personal service is not requisite, may be served *by filing them with the proper officer*;" by R. 5. that "Where *personal* service of any writ, notice, pleading, order, summons, warrant, or other document, proceeding, or written communication is required by these Rules or otherwise, the service shall be effected as nearly as may be in the manner prescribed for the personal service of a writ of summons"; and by R. 6, that "Where personal service of any writ, notice, pleading, summons, order, warrant, or other document, proceeding or written communication is required by these Rules or otherwise, and it is made to appear to the court or a judge that prompt personal service cannot be effected, the court or judge may make such order for *substituted or other service*,¹ or for the substitution of notice for service by letter, public advertisement, or otherwise, as may be just." The same Order also contains provisions—in R. 7, that "Where a party after having sued or appeared in person has given notice in writing to the opposite party or his solicitor, through a solicitor, that such solicitor is authorised to act in the cause or matter on his behalf, all writs, notices, pleadings, summonses, orders, warrants, and other documents, proceedings, and written communications, which ought to be delivered to or served upon the party on whose behalf the notice is given, shall thereafter be delivered to or served upon such solicitor;" in R. 8, that "Where a person who is not a party appears in any proceeding either before the court or

¹ See Ord. X., cited below.

in chambers, service upon the solicitor in London by whom such person appears, whether such solicitor act as principal or agent, shall be deemed good service except in matters requiring personal service," and in R. 9, that "Affidavits of service shall state when, where, and how, and by whom such service was effected." It is also required (by Ord. X., R. 1), that "Every application to the court or a judge for an order for substituted or other service, or for the substitution of notice for service shall be supported by an affidavit setting forth the grounds upon which the application is made."

§§ 1586a
—1586c.

§ 1586b. The service of any summons or process of the County Courts by a bailiff may be proved by indorsement on a copy of such document under the bailiff's hand, showing the fact and mode of such service; and any bailiff wilfully and corruptly indorsing any false statement on such copy shall incur the same penalties as if he had committed perjury.¹

§ 1586c. The proof of the service of *process of courts of summary jurisdiction* is now considerably simplified,² and "In a proceeding within the jurisdiction of a court of summary jurisdiction, without prejudice to any other mode of proof, service on a person of any summons, notice, process, or document required or authorised to be served, and the handwriting and seal of any justice of the peace or other officer or person on any warrant, summons, notice, process, or document, may be proved by a solemn *declaration* taken before a justice of the peace, or before a commissioner to administer oaths in the Supreme Court of Judicature, or before a clerk of the peace, or a registrar of a county court; and any declaration purporting to be so taken shall, until the contrary is shown, be sufficient proof of the statements contained therein, and shall be received in evidence in any court or legal proceeding, without proof of the signature or of the official character of the person or persons taking or signing the same."³ Any person

¹ 51 & 52 V. c. 43, § 78.

² By 42 & 43 V. c. 49 ("The Summary Jurisdiction Act, 1879"), § 41. See, also, 44 & 45 V. c. 24 ("The Summary Jurisdiction (Process) Act, 1881"), § 4, sub-s. 1, extending the operation of the section

cited above to the proof of English process executed in Scotland, and Scotch process executed in England.

³ The form and fee (viz. 1s.) for a declaration are provided by the rules (16th July, 1886) made under the Act.

§§ 1586c wilfully making a false declaration in any material particular
 —1588. “shall be guilty” of perjury.

§ 1587. The most usual modes of proving the service of the *process* of courts having now been discussed, it remains to see how the *practice and proceedings* of certain particular courts can be proved. Now, the Rules and Orders of the Supreme Court, the Rules of the old Superior Common Law Courts, and the Orders of the old Court of Chancery, may be strictly proved in any court by the production of office copies, for such copies are given out by the officer in the usual course of his business.¹ In practice, however, it is never necessary to have recourse to this mode of proof, all tribunals are now content to rely on the authenticity of any copy of the High Court, County Court or Mayors' Court Rules purporting to be published as a portion of the authorised reports, or, indeed, printed by any printer of repute. It may, however, still be necessary to prove more strictly the general rules and regulations of some less known inferior courts, in which case if a printed copy of such rules, &c., be made use of, it must be proved that it has received the sanction of such court.²

§ 1588. Among the proceedings of competent courts are *probates* and *administrations*. The *probate* of a will is a copy of that instrument under the seal, either of the Ecclesiastical Court, or, since 11th January, 1858, of the Probate Court or Division, to which is attached a certificate, stating that the original will has been duly proved and registered, and that administration of the goods of the deceased has been granted to one or more of the executors named therein.³ This document,—which, in the event of the will being proved in solemn form of law, can only be granted after satisfactory evidence has been furnished to the court of adequate capacity on the part of the testator, of testamentary

¹ Selby v. Harris, 1898, 1 Ld. Raym. 745; Duncan v. Scott, 1807, 1 Camp. 100; Streeter v. Bartlett, 1848, 17 L. J. C. P. 140; Jack v. Kiernan, 1840, 2 Jebb. & Sy. 231; May. of Ludlow v. Charlton, 1840, 9 C. & P. 242.

² In one case (Dance v. Robson, 1829, M. & M. 294 (Ld. Tenterden)), one of the printed copies of the rules

of the old Insolvent Court, proved to be printed by order of the court, was admitted. In a later one (R. v. Koops, 1837, 6 A. & E. 193, in which, however, Dance v. Robson was not cited), proof that the court had ever sanctioned such printed rules not being given, a similar copy of the same rules was rejected.

³ Toller on Ex. 58.

intention untainted by fraud, and of due execution,¹—constitutes the title deed of the executor, without which his character cannot be recognised, and armed with which it cannot in general be impugned.²

§§ 1588,
1589.

§ 1589. The primary mode of proving a probate is by producing either the document itself, when due notice will be taken of the seal,³ or the Act-book or register from the Probate Division,⁴ containing an entry that the will has been proved, and probate granted, or even a certified or examined copy of such book or register.⁵ In some of the inferior spiritual courts,⁶ no Act-book, or other separate record of the granting of probates was kept, and in such a case it will be enough to prove that a memorandum has been indorsed on the will itself, stating that the executor has proved it, and that the probate has passed the seal; and on proof of the practice to keep no Act-book, and on production of the will with such indorsement, the title of the executor will be sufficiently established, without accounting for the non-production of the probate.⁷ Under no other circumstances, however, will the original Will be admitted as evidence of title to *personal* property.⁸ In the event of the probate being lost or destroyed, it seems that it *may* be proved by an examined copy;⁹ but in such case the practice of the Probate Division,¹⁰—like that which used

¹ Jones v. Godrich, 1845, 5 Moo. P. C. C. 19 (Dr. Lushington).

² Toller on Ex. 74, 75; Allen v. Dundas, 1789, 3 T. R. 125; Ryves v. D. of Wellington, 1846, 9 Beav. 579. As to the jurisdiction of the Probate Division to grant probate in the case of a married woman's will made in pursuance of a power, see Barnes v. Vincent, 1846, 5 Moo. P. C. C. 201 (P. C.), cited post, § 1712. See, also, Ward v. Ward, 1848, 11 Beav. 377. As to the effect of the Probate Division sealing Scotch confirmations of executors, see 21 & 22 V. c. 56 ("The Confirmation of Executors (Scotland) Act, 1858"), §§ 12, 13. See, also, Hawarden v. Dunlop, 1861, 31 J. J. P. 17; and Hood v. Id. Barrington, 1868, L. R. 6 Eq. 218.

³ Kempton v. Cross, 1735, Cas. temp. Hardw. 108; ante, § 6.

⁴ Cox v. Allingham, 1822, Jac. 514. So, the revocation of probate

may be proved by the Act-book: R. v. Ramsbottom, 1787, 1 Lea. 25, n. See, ante, § 425.

⁵ Davis v. Williams, 1811, 13 East, 232; R. v. Phillpott, 1851, 2 Den. 308; Dorrett v. Meux, 1854, 23 L. J. P. C. 221; 14 & 15 V. c. 99, § 14, cited post, § 1599.

⁶ For instance, the bishops' courts at Winchester and Wells.

⁷ Doe v. Mew and Doe v. Gunning, 1837, 7 A. & E. 240. See, also, Gorton v. Dyson, 1819, 1 B. & B. 219.

⁸ Pinney v. Pinney, 1828, 8 B. & C. 335; R. v. Barnes, 1816, 1 Stark. R. 244; Stone v. Forsyth, 1781, 2 Doug. 707.

⁹ R. v. Hains, 1695, Skin. 584 (Ld. Holt); Hoe v. Nelthorpe, or Nathrop, 1697, 3 Salk. 154.

¹⁰ See 20 & 21 V. c. 77 ("The Court of Probate Act, 1857"), by § 69, enacting, that "an official copy

§ 1589— to prevail in the spiritual courts,—is to grant either an exemplification, or a certified copy of the entry of the Act-book or register in which the grant of probate is recorded.¹
 1591.

§ 1590. A grant of *administration* may also be proved either by producing the letters of administration under the seal of the court,² or the Act-book or register containing a record of the grant, or an exemplification, or an examined or a certified copy of such record,³ or an official certificate of the grant.⁴ Either of these kinds of proof will be primary evidence.⁵

§ 1591.⁶ The next class of public writings to be considered consists of *official books* or *registers*, kept by persons in public offices, in which such persons are required, (either by statute or as naturally incidental to the office,) to write down particular transactions, occurring in the course of their public duties, and under their personal observation. Entries in such books and similar documents of a public nature, are generally admissible in evidence, although their authenticity be not confirmed by the usual test of truth, namely, the swearing, and the cross-examination, of the persons who prepared them. They are entitled to this extraordinary degree of confidence, partly, because in some cases they are required by law to be kept, and in all because their contents are of public interest and notoriety. They are, too, made under the sanction of an oath of office, or, at least, under that of official duty, by accredited agents appointed for that purpose. Moreover, though the facts stated in them are of

of the whole or any part of a will, or an official certificate of the grant of any letters of administration, may be obtained from the registry or district registry where the will has been proved or the administration granted, on the payment of such fees as shall be fixed for the same by the rules and orders under this Act." The fees fixed by the Rules are sixpence for every folio of seventy-two words of office-copy, and an additional fee of £1 for "every office-copy of will *under seal* of the court." See, also, 20 & 21 V. c. 79, § 74, Ir.

¹ *Shepherd v. Shorthose*, 1719, 1 Str. 412. See post, § 1599.

² The seal is judicially noticed, ante, § 6.

³ See *M'Kenna v. Eager*, 1875, Ir. R. 9 C. L. 79.

⁴ See 20 & 21 V. c. 77, § 69, cited above, n.². See, also, 20 & 21 V. c. 79, § 74, Ir.

⁵ *Kempton v. Cross*, 1735, Cas. temp. Hardw. 108; *Elden v. Keddell*, 1807, 8 East, 187; *Davis v. Williams*, 1811, 13 East, 232. See ante, § 425, and post, § 1599. As to the admissibility of probates and letters of administration on the trial of causes relating to real estate, see post. §§ 1759—1761.

⁶ Gr. Ev. § 483, in great part.

a public nature, it would often be difficult to prove them by §§ 1591—1593. means of sworn witnesses.¹

§ 1592. To render a document admissible in evidence as an *official register*, it must be one which the law requires to be kept for the public benefit. When a book does not answer this description neither the original book nor extracts from it can be admitted in evidence.²

§ 1593. A similar rule prevails with respect to the reception in evidence of *foreign and colonial registers*. Such registers or

¹ 1 St. Ev. 230.

² Accordingly, the following books (and, of course, extracts from them) are not admissible in evidence:—*Bankruptcy proceedings*, shown by a book produced from the office (now abolished by 15 & 16 V. c. 77, § 1) of the Secretary of Bankrupts: *Henry v. Leigh*, 1813, 3 Camp. 499. *Baptism and marriage registers and records* (now deposited in the office of the registrar-general pursuant to the Act 3 & 4 V. c. 92, §§ 6, 20) as to the performance of those ceremonies at the Fleet and King's Bench Prisons, at May Fair, at the Mint, in Southwark, and in certain other places: *Read v. Passer*, 1794, Pea. R. 232; *Doe v. Gatacre*, 1838, 8 C. & P. 578. *Customhouse returns*, voluntarily made, e.g., a report stating the burthen of a foreign ship, and the number of the crew, made by the master to the authorities at the custom house, and there filed, when tendered in evidence as a public document: *Huntley v. Donovan*, 1850, 15 Q. B. 96; or a certificate filed at the custom house, signed by a party who certified that he had measured the vessel, and stated the amount of the tonnage: *Id.* *Dissenting chapels*, registers of births, marriages, or burials, whether from Wesleyan or other dissenting chapels, unless such register has been deposited in the office of the registrar-general, and entered in his list pursuant to 3 & 4 V. c. 92; *Whittuck v. Waters*, 1830, 4 C. & P. 376; *Newham v. Raithby*, 1811, 1 Phillim. 315, *Ex parte Taylor*, 1820, 1 Jac. & W. 483; and as to the Act, see ante, § 1503, and post, § 1602, note. *Heralds' College books*, as, e.g., a book produced from the Heralds' College

called "Arms and Descents of the Nobility": *Shrewsbury Peer.*, 1857, 7 H. L. C. 1, but in pedigree cases such books may sometimes be admissible, see post, § 1769. *Marriage registers*, kept by clergymen in Ireland, prior to the 31st of March, 1845, when the Irish Marriage Act came into operation: *Stockbridge v. Quicke*, 1853, 3 C. & K. 305. *Jewish registers of circumcisions*, kept at the great synagogue in London, though the entries in it be proved to be in the handwriting of a deceased chief rabbi, whose religious duty it was to perform the rites of circumcision, and to make corresponding entries in the book: *Davis v. Lloyd*, 1844, 1 C. & K. 276; but see observations on this case, ante § 701. *Lloyd's Registers of Shipping* (for a description of which registers see *Kerr v. Shedden*, 1831, 4 C. & P. 531, n.; *Freeman v. Baker*, 1833, 5 C. & P. 482. Although in *Bain v. Case*, 1829, 3 C. & P. 496, and in *Abel v. Potts*, 1800, 3 Esp. 242, this book was admitted: in the first case to prove that the coast of Peru was in a state of blockade at a particular time, and in the other as evidence of the capture of a vessel. See, also, *Richardson v. Mellish*, 1824, 2 Bing. 241 (Best, C.J.). *Poor law medical officer's register* of attendance, not kept by him under any statute, but merely for the inspection of the guardians, in obedience to a rule of the Poor Law Commissioners, no additional payment being given to the officer in respect of the entries (he being paid by a yearly salary), but the book being simply intended as a check upon him: *Merrick v. Wakley*, 1838, 8 A. & E. 170.

§§ 1593,
1594.

extracts from them are only admissible on proof that they are required to be kept, either by the law of the country to which they belong,¹ or by the law of this country.² In America, authenticated copies of foreign registers are always receivable in evidence.³

§ 1594.⁴ It is essential to the official character of books, which would, if properly kept, be admissible in evidence, that the entries in them be made promptly, or, at least, without such long delay as to impair their credibility, and that they be made by the person whose duty it was to make them, and in the mode required by law, if any has been prescribed.⁵ Accordingly, a minister's entry of a baptism, which took place before he had any connection with the parish, and of which he received information from the clerk, is inadmissible. An entry in a parish register will not be rejected *merely* because it was not made contemporaneously, or because it was made or sanctioned by the incumbent, on information received from some other person; since it will be presumed

¹ See Perth Peer., 1846-8, 2 H. L. C. 265; *Abbott v. Abbott and Godoy*, 1860, 29 L. J. P. & M. 57.

² Accordingly, in the absence of proof of any such requirement, the following have been rejected:—*Baptismal registers* kept voluntarily in Guernsey: *Huet v. Le Mesurier*, 1786, 1 Cox, Ch. 275 (on which case Dr. Lushington, in *Coode v. Coode*, 1838, 1 Curt. 755, observed that the evidence was rejected, "because it did not appear by what authority the register was kept. Supposing it had been proved that Guernsey was part of the diocese of Winchester, which it is, and that by ancient custom a register was required to be kept there, different considerations might have applied to the case. . . . I am of opinion, that there is no ground of distinction, supposing the register had been kept by order of a competent authority, between registers kept in Guernsey and in this country"). *Baptismal registers* kept voluntarily by the chaplain of a British minister at a foreign court: *Dufferin Peer.*, 1848, 2 H. L. C. 47. *Marriage registers as to marriages solemnized abroad*, kept in the Swedish ambassador's chapel at Paris (prior

to the 28th of July, 1849, the date of the passing of 12 & 13 V. c. 68 ("The Consular Marriage Act, 1849")); *Leader v. Barry*, 1795, 1 Esp. 353. And a book kept at the British ambassador's hotel in Paris, wherein the ambassador's chaplain had made and subscribed entries of all marriages of British subjects celebrated by him: *Athlone Peer.*, 1841, 8 Cl. & Fin. 262. On the other hand, marriage registers are admissible which are proved to have been kept in Barbadoes under a law of that colony requiring such register to be kept. Moreover, the marriage register which used to be kept in the Ionian Islands is receivable in evidence; and by 27 & 28 V. c. 77, § 7, a copy of such register is admissible if it purports "to be certified under the signature and official seal of the secretary of the Lord High Commissioner."

³ *Kingston v. Lesley*, 1824, 10 Serg. & R. 383 (Am.).

⁴ Gr. Ev. § 485, as to first five lines.

⁵ *Doe v. Bray*, 1828, 8 B. & C. 513; *Walker v. Wingfield*, 1812, 18 Ves. 443.

that the incumbent, however he got his information, had satisfied himself of the fact before he authorised the entry. Accordingly, an entry in a parish book (kept at the parish church), of a burial in the workhouse cemetery within the parish, has been admitted, though it appeared that the incumbent sanctioned the entries on the faith of statements by others, and not from personal knowledge of the burials.¹

§ 1595. Official books and registers may be proved either by the production of the originals themselves or by copies.² The highest method of proof, and the only one which formerly existed at common law with regard to many such documents, is by production of the originals together with proof that they come from the proper repository.³ This method of proof, however, was not always insisted on by the common law, and in some cases is even not generally available.⁴ In practice official books and registers and documents of a like nature are now always proved by means of examiners or certified copies under the statutory provisions hereafter mentioned,⁵ unless the circumstances of the case render the examination by the court of the actual entry necessary to justice.

§ 1596. Besides official books and registers, there are certain other documents of a somewhat similar nature which the Legislature has provided may under certain circumstances be admitted in evidence on mere production; the provision above referred to as to copies does not, however, apply to these documents.⁶

¹ Doe v. Andrews, 1850, 15 Q. B. 756.

² A list of such documents most commonly met with will be found post, § 1600, n.

³ Atkins v. Hatton, 1794, 2 Anst. 386; Armstrong v. Hewett, 1817, 4 Price, 216; Pulley v. Hilton, 1823, 12 Price, 625; Swinnerton v. M. of Stafford, 1810, 3 Taunt. 91. See ante, §§ 432 et seq.; and §§ 659 et seq.; and Croughton v. Blake, 1843, 13 L. J. Ex. 78, as to the repository.

⁴ See post, § 1597.

⁵ Lord Brougham's Evidence Act, 1851 (14 & 15 V. c. 99), § 14, post, § 1599.

⁶ Some of the principal of such

documents are:—Documents under "The Army Act, 1881" (44 & 45 V. c. 59), § 172, sub-sect. 1, amended by 48 V. c. 8, § 7, providing that all orders authorised by the Act "to be made by the Commander-in-Chief or the Adjutant-General, or by the Commander-in-Chief or Adjutant-General of the Forces in India, or in any Presidency in India, or by any general or other officer commanding," and also that any "such order may be signified by an order, instruction, or letter under the hand of any officer authorised to issue orders on behalf of such" superior officer; and any such document purporting to be so signed, shall be evidence of the party signing

§ 1597. **§ 1597.** With respect to many such books and documents, the strictness of the common law rule that their contents could only

being so authorised. While by § 163, sub-s. 1 (b), of the same Act, any letter, return, or other document respecting the service, non-service, or discharge of any person as a soldier or marine is made evidence of the facts stated in such letter, return, or document, provided that, on production, it purports to be signed as in the sub-section mentioned. So, also, any descriptive return, within the meaning of § 154 of the same Act, must be produced as an original document, but it will be evidence of the matters therein stated if it purport to be signed by a justice of the peace. *Company's Books*, where the company is subject to the provisions of "The Companies Clauses Consolidation Act" (8 & 9 V. c. 16), which contain, pursuant to § 98 of the Act, entries of the proceedings of the directors, of the committees of directors, and of the meetings of the company, where each entry purports to be signed by the chairman of the meeting. *Books of Companies*, to which the Companies Act of 1862 (25 & 26 V. c. 89) applies, if containing minutes purporting to be signed by the chairman, either of the meeting to which it relates or of the next succeeding meeting, as, by § 67 of the Act, such books are to be received as *prima facie* evidence; (see, also, as to proof of other documents relating to companies, and registered under the Companies Acts, post, § 1603; also, as to certificates of incorporation under the same Acts, § 1630). *Friendly Societies*.—By "The Friendly Societies Act, 1896" (59 & 60 V. c. 25), § 100, "every document bearing the seal or stamp of the central office shall be received in evidence without further proof; and every document purporting to be signed by the chief or any assistant registrar, or any inspector, or public auditor or valuer under this Act, shall, in the absence of any evidence to the contrary, be received in evidence without proof of the signature. *Merchant Shipping Documents*.—It being, by "The Merchant Shipping Act, 1894" (57 & 58 V. c. 60), pro-

vided generally (§ 719) that "all documents purporting to be made, issued, or written by or under the direction of the Board of Trade, and to be sealed with the seal of the Board, or to be signed by their secretary or one of their assistant secretaries, or if a certificate by one of the officers of the marine department, shall be admissible in evidence in manner provided by this Act": while provision as to the proof of regulations in force for preventing collisions at sea is made by § 419 (5) of the same Act, cited post, § 1604. "*The Metropolis Local Management Act, 1855*" (18 & 19 V. c. 120), § 60, renders the minutes of proceedings of the *Metropolitan Board of Works* (which has now ceased to exist, and whose powers, duties, and liabilities are, by "The Local Government Act, 1888" (51 & 52 V. c. 41), § 40, transferred to the London County Council, and of district boards and vestries in the metropolis, admissible in evidence, provided they purport to be signed by any two of the members present. *Public Baths*.—Books containing entries of the proceedings of the commissioners may, under 9 & 10 V. c. 74 ("The Baths and Washhouses Act, 1846"), § 13, be read as evidence if the originals are produced purporting to be signed by two commissioners. *Railway documents* are in many cases evidence, e.g., the orders and documents which have proceeded from the old (see 14 & 15 V. c. 64, § 1) commissioners of railways, when purporting to be sealed or stamped with the seal of the commissioners, and to be signed by two or more of that body (9 & 10 V. c. 105, § 4), and documents that proceed from the present commissioners if purporting to be signed by any one of such commissioners (36 & 37 V. c. 48, § 30): the same rule applies to all documents relating to railways which now emanate from the Board of Trade, and which purport to be signed by one of the secretaries or assistant secretaries of the Board, or by some officer appointed by the Board to sign such documents (14 &

be proved by production of the originals was not usually insisted upon—the public inconvenience that would follow the removal of *books of general concernment*, being felt to be so great, as to justify, and in some cases to compel, the introduction of secondary evidence.¹ In consequence of these considerations, it has become a common law axiom of almost universal application, that *whenever a book is of such a public nature as to be admissible in evidence on its mere production from the proper custody, its contents may be proved by an authentic copy.*² The books to which this indulgence is extended are those belonging to a particular custody, out of which they are not usually taken but by special authority, granted only in cases where inspection of the book itself is necessary for the purpose of identifying it, or of determining some question arising upon the original entry, or of correcting an error, which has been duly ascertained. Such books are, in general, not removable at the call of individuals, and they, moreover, being interesting to many persons, might be required as evidence in different places at the same time. So anxious are the judges not to break in upon this rule, founded as it is on public convenience, that even though the original document be in court, they will not require its production, but will admit the copy, provided its authenticity be established.³

§ 1598. An *examined copy*, duly made and sworn to by a competent witness, has ever been considered as “authentic,” within the meaning of the above axiom.⁴

§ 1599. The Legislature has, however, now provided a simple method of proof which is available in the case of official registers

15 V. c. 64, § 3; 31 & 32 V. c. 119, §§ 39, 47, and Sched. 2. This last Act repeals 7 & 8 V. c. 85 (“The Railways Regulation Act, 1844”), § 23, which made certain of such documents provable by “certified copies”). “*The Sea Fisheries Act, 1883*” (46 & 47 V. c. 22), § 17, renders any document drawn up in pursuance of the 1st Schedule thereof admissible as evidence of the facts or matters therein stated, and under certain circumstances such facts may be certified officially, and such document or certificate will be admissible evidence without proof

of the signature.

¹ *Mortimer v. McCallan*, 1840, 6 M. & W. 68.

² *Lynch v. Clerke*, 1696, 3 Salk. 154 (Holt, C.J.); *R. v. Hains*, 1695, Comb. 337; *Hoe v. Nathrop*, 1697, 3 Salk. 154.

³ *Marsh v. Collnett*, 1798, 2 Esp. 666. See § 87, ante, as to an analogous rule, in not requiring a subscribing witness to an *ancient deed* or will to be called, even though present in court.

⁴ See *R. v. Mainwaring*, 1857, 26 L. J. M. C. 10.

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and similar documents. For by Lord Brougham's Evidence Act of 1851,¹ it is enacted: ²—"Whenever any book or other document is of such a public nature as to be admissible in evidence on its mere production from the proper custody, and no statute exists which renders its contents provable by means of a copy, any copy thereof or extract therefrom shall be admissible in evidence in any court of justice, or before any person now or hereafter having by law or by consent of parties authority to hear, receive, and examine evidence, provided it be proved to be an examined copy or extract, or provided it purport to be signed and certified as a true copy or extract by the officer to whose custody the original is intrusted, and which officer is hereby required to furnish such certified copy or extract to a person applying at a reasonable time for the same, upon payment of a reasonable sum for the same, not exceeding fourpence for every folio of ninety words." In conformity with this section, a copy of an entry in a local registry of births, certified under the hand of a "deputy superintendent registrar," has been received in evidence;³ and under the same enactment the now abolished ⁴ Clerk of Records and Writs was ordered by the Court to furnish certified copies of any bills, answers, and depositions which were in his custody, and which were required to be used on the trial of a cause.⁵

§ 1600. Among the public books and documents, the contents of which, in the absence of the originals, are now provable under the enactment just cited, either by examined or by certified copies, some of those which are most commonly met with are mentioned below in a footnote.⁶

¹ 14 & 15 V. c. 99.

² Id. § 14.

³ R. v. Weaver, 1873, L. R. 2 C. C. R. 885.

⁴ See 42 & 43 V. c. 78, Sched. 1; and R. S. C. 1883, Ord. LX. r. 3; Ord. LXI. r. 1.

⁵ Reeve v. Hodson, 1853, 10 Hare, App. XIX.

⁶ An enumeration of the whole of the documents which are of such a public nature as to be admissible in evidence on mere production, and which are therefore provable under the enactment by examined or certi-

fied copies would be practically impossible. But among the more important of such documents are the following:—*Admiralty* documents, including the log-books and muster-books of his Majesty's ships, and even official letters lodged at the Admiralty (*D'Israeli v. Jowett*, 1795, 1 Esp. 427; *Watson v. King*, 1815, 1 Stark. R. 121; *R. v. Fitzgerald*, 1741, 1 Lea. C. C. 20; *R. v. Rhodes*, 1742, 1 Lea. C. C. 24; *Barber v. Holmes*, 1800, 3 Esp. 190; most of these documents are now lodged at the Record Office, see ante § 1485); lists

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of convoy (*Richardson v. Mellish*, 1824, 2 Bing. 241); the books of the Sick and Hurt Office (*Wallace v. Cook*, 1804, 5 Esp. 117); and the books kept by the coastguard showing the state of the wind and weather (*The Catherina Maria*, 1866, L. R. 1 Adm. 53). *Bank of England's* deposit and transfer books (*Breton v. Cope*, 1791, Peake, R. 30; *Marsh v. Collnett*, 1798, 2 Esp. 665; *Mortimer v. McAllan*, 1840, 6 M. & W. 68). *Birth, Marriage, or Death* registers, including parish registers (*Doe v. Barnes*, 1834, 1 M. & Rob. 386. In *Re Porter's Trusts*, 1855, 25 L. J. Ch. 688, Wood, V.-C., held that an extract from a parish register, signed by the curate of the parish, was admissible. So, also, did the Lords Justices in *Re Hall's Estate*, 1852, 22 L. J. Ch. 177, though that case is erroneously reported as a decision to the contrary in 2 De Gex, M. & G.; see 52 G. 3, c. 146), the register of births, marriages, and deaths made pursuant to "The Registration Act" (6 & 7 W. 4, c. 86); the registers of births and deaths (26 & 27 V. c. 11, § 5, Ir.); and the register of marriages (7 & 8 V. c. 81, §§ 52, 71, Ir.; 26 & 27 V. c. 27, § 16, Ir.) in Ireland (*Wallace v. Wallace*, 1896, 74 L. T. 253); the books of baptisms (*Queen's Proctor v. Fry*, 1879, 4 P. D. 230); marriages (as to those solemnized since the 1st January, 1852; see 14 & 15 V. c. 40, §§ 21, 22), and deaths in India, which are deposited in the office of the Secretary for India (*Westmacott v. Westmacott*, [1899] P. 183; *Ratcliff v. Ratcliff* and *Anderson*, 1859, 29 L. J. P. & M. 171, in which case, however, the original was produced; see, also, Report of 1838, by Commission to inquire into the state of non-parochial registers, p. 13); the register of marriages in the Ionian Islands, which has been transmitted to the registrar-general by the Lord High Commissioner (27 & 28 V. c. 77, §§ 8, 10); the registers of marriages kept by British consuls abroad prior to the 28th July, 1849; but "The Consular Marriage Act, 1849" (12 & 13 V. c. 68, § 20), now repealed by the Foreign Marriage Act, 1892, (which see below), made valid all

marriages which—one or both of the parties to which being a British subject—were solemnized before the 28th July, 1849, according to any religious rites or ceremonies, or were contracted per verba de presenti in any foreign country or place, and registered by or under the authority of any British consul-general, consul, or vice-consul, exercising his functions within such country or place, if the signature of the parties were written in the register. "The Foreign Marriage Act, 1892" (55 & 56 V. c. 23) was passed the 27th June, 1892, and, by § 1, makes valid all marriages between parties, of whom one at least is a British subject, before a "marriage officer." By § 11, a marriage officer is defined to be a person authorised in writing by a secretary of state; and, by § 21, power is given to make regulations, and to direct who shall be "marriage officers"; and foreign registers of marriages, on proof that they are required to be kept by the laws of the countries to which they respectively belong (*Burnaby v. Baillie*, 1889, 42 Ch. D. 282; *Abbott v. Abbott* and *Godoy*, 1860, 29 L. J. P. & M. 57). *Corporations*.—Books containing their official proceedings and matters affecting their property, if the entries are of a public nature (*Marriage v. Lawrence*, 1819, 3 B. & Ald. 412; *R. v. Mothersell*, 1707, 1 Str. 92; *Thetford's Case*, 1719, 12 Vin. Abr. 90 pl. 16; *Warriner v. Giles*, 1734, 2 Str. 954, 1223 n. 1). *Court Baron* rolls (B. N. P. 247; *Doe v. Askew*, 1809, 10 East, 520), though they are not the copies delivered to the tenant of the estate (*Breeze v. Hawker*, 1844, 14 Sim. 350). *East India Company's* deposit and transfer books (2 Doug. 593, n. 3; *Doe v. Roberts*, 1844, 13 M. & W. 520), and lists of passengers which, in pursuance of an old statute, used to be transmitted by the captains of ships in the India trade to the court of directors of that company (*Richardson v. Mellish*, 1824, 2 Bing. 241). *Ecclesiastical documents*, such as bishop's registers and chapter-house registers (*Arnold v. Bp. of Bath and Wells*, 1829, 5 Bing. 316; *Coombs v. Coether*, 1829, M. & M. 398; *Humble*

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§ 1601. The section of Lord Brougham's Act, quoted above,¹ refers only to such documents as are not provable by means of copies under any other statutable provision. But there are many

v. Hunt, 1817, Holt, N. P. R. 601), and terriers (B. N. P. 248, 1 St. Ev. 239). *Land-Tax* assessments (*Doe v. Seaton*, 1834, 2 A. & E. 138 (Patteson, J.); *Doe v. Arkwright*, 1833, 5 C. & P. 575 (Id. Denman); *R. v. King*, 1788, 2 T. R. 235)—as to those in the Record Office see ante, § 1533. *Log-books* officially kept by the masters of British ships, as directed by "The Merchant Shipping Act, 1894" (57 & 58 V. c. 60, §§ 239—243). *Middlesex Registry* of deeds, apparently (see *Collins v. Maule*, 1838, 8 C. & P. 502; *Doe v. Kilner*, 1826, 2 C. & P. 289). The registers of *Parliamentary voters* which are in the custody of the sheriffs or returning officers (*Reed v. Lamb*, 1860, 6 H. & N. 75; 6 & 7 V. c. 18, §§ 48, 49); and some of the documents relating to the election of members of parliament (35 & 36 V. c. 23, Sched. I., Part I., r. 42). *Poor Law Valuations* and valuations of rateable property in Ireland (*Swift v. M'Tiernan*, 1848, 11 Ir. Eq. R. 602; *Welland v. Ld. Middleton*, 1844, 11 Ir. Eq. R. 603; 15 & 16 V. c. 36, Ir.; 23 & 24 V. c. 4, § 9, Ir.). *Probate Division Registry's* Act-book and registers (see *Davis v. Williams*, 1811, 13 East, 232; *Dorrett v. Meux*, 1854, 23 L. J. C. P. 221. Entries in this book may also be proved by an exemplification; ante, § 1589). *Public Offices* books, and other official papers, including the books of the Customs (*Johnson v. Ward*, 1806, 6 Esp. 47; *Tomkins v. Att.-Gen.*, 1813, 1 Dow. 404; *Buckley v. U. S.*, 1846, 4 How. Sup. Ct. Rep. 258 (Am.)), of the office of Inland Revenue (12 & 13 V. c. 1, § 6, amended by 43 & 44 V. c. 19; see, also, 53 & 54 V. c. 21, §§ 3, 4, 6, 13, et seq.), and of the Post Office (*Mortimer v. McCallan*, 1840, 6 M. & W. 68; *Fuller v. Fotch*, 1695, Carth. 346); the books of entry, records, deeds, instruments, writings, maps, plans, and other official papers deposited in the office of land revenue, records, and enrolments (*Doe*

v. Roberts, 1844, 13 M. & W. 520; 2 W. 4, c. 1 ("The Crown Lands Act, 1832"), §§ 15 et seq.; 7 & 8 V. c. 89); of the Stamp Offices: of what were formerly the Excise (*Fuller v. Fotch*, 1695, Carth. 346; *R. v. Greenwood*, 1815, 1 Price, 369; of the Post Office; and those of the Register Offices of Merchant Seamen (57 & 58 V. c. 60, §§ 251, 256); as also those kept at the Register Office of Copyright (5 & 6 V. c. 45 ("The Copyright Act, 1842"), § 11, and 7 & 8 V. c. 12 ("The International Copyright Act, 1844"), § 8); and likewise the books kept at *Public Prisons* (*Salte v. Thomas*, 1802, 3 B. & P. 188; *R. v. Arkles*, 1785, 1 Lea. 294, 297 n., 300 n. (a). As to proof of Crown leases, &c., recorded in Scotland, see 36 & 37 V. c. 36, § 5). *Railway companies'* by-laws, made pursuant to "The Railways Clauses Consolidation Act, 1845" (*Motteram v. E. Cos. Rail. Co.*, 1859, 29 L. J. M. C. 57; 8 & 9 V. c. 20, §§ 108—111, cited post, § 1656). *Rate-books*, including, probably, poor-rate books (*Justice v. Elstob*, 1858, 1 F. & F. 256; see, however, 32 & 33 V. c. 41, § 18, cited ante, § 147A.), and, perhaps, those kept by local authorities under "The Public Health Act, 1875" (38 & 39 Vict. c. 55), § 223 of which enacts, that "the production of the books purporting to contain any rate or assessment made under this Act, shall, without any other evidence whatever, be received as prima facie evidence of the making and validity of the rates mentioned therein." *Savings Banks* rules, though they cannot be proved by certified copies under Lord Brougham's Act, are provable under 26 & 27 V. c. 87 ("The Trustee Savings Bank Act, 1863"), § 4, either by production of the originals deposited with the Commissioners for the Reduction of the National Debt, or by examined copies; *Vestry books* (*R. v. Martin*, 1809, 2 Camp. 100).

¹ Ante, § 1599.

registers and documents, *certified copies* of which are receivable in evidence, by virtue of some enactment having special reference to them. Some of the principal of the registers thus provable are referred to in the footnote.¹

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¹ The principal documents which are, under particular Acts of Parliament, thus provable by means of *certified copies*, and are most commonly met with, are as follows:—*Army documents*.—All records made in regimental books in pursuance of any Act, or of the Queen's Regulations, or of military duty, are, by "The Army Act, 1881" (44 & 45 V. c. 58), § 163, subs. 1 (g) and 1 (h), admissible in evidence of the facts therein stated, provided they purport to be signed by the commanding officer, or the officer whose duty it is to make them; and a copy of any such record, purporting to be signed by the officer having the custody of such book, is evidence of such record. So, also, by § 163, subs. 1 (e), of the same Act, all warrants or orders made in pursuance of the Act by any military authority are "evidence of the matters and things therein directed to be stated," and may be proved by copies purporting to be certified "by the officers therein alleged to be authorised by a Secretary of State or Commander-in-Chief to certify the same." Again, by § 163, subs. 1 (a), the attestation paper (as to which see § 80 of the Act) purporting to be signed by a soldier, or his declaration made on re-engagement in any of the regular forces or on any enrolment in any branch of the service, is evidence of his having given the answers to questions which he is therein represented as having given; and his enlistment may be proved by a copy of his attestation paper, purporting to be certified by the officer having the custody of such document. The provisions of § 163 of "The Army Act, 1881," also apply to proceedings under "The Reserve Forces Act, 1882" (45 & 46 V. c. 48), § 27, and "The Militia Act, 1882" (45 & 46 V. c. 49), § 44, subs. 2. The same mode of proof applies to the rules for the management of the property, finances, and civil affairs of volunteer corps, which are provable

by copies certified under the hands of the respective commanding officers as true copies of the rules whereof her Majesty's approval has been notified: 26 & 27 V. c. 65 ("The Volunteer Act, 1863"), § 24. This Act, so far as its provisions are applicable, also extends to volunteer drill-grounds, by 49 V. c. 5, while Part V. of such Act is applied to yeomanry by 54 & 55 V. c. 54, § 14. See also, 36 & 37 V. c. 77, § 22, as to proof of the Rules of the Naval Artillery Volunteer Force. By-laws as to land held for rifle ranges may, by 48 & 49 V. c. 36, be proved under "The Documentary Evidence Act, 1868." *Ballot Act*: see *Parliamentary Elections. Banking copartnerships*.—The memorials setting forth the firm names, and the names and places of abode of the members and public officers of banking copartnerships (see 7 G. 4, c. 46 ("The Country Bankers Act, 1826"), §§ 4, 6), which are kept at the office of Inland Revenue (53 & 54 V. c. 21 ("The Inland Revenue Regulation Act, 1890"), § 1, subs. 2, and §§ 3—5), may be proved by copies certified under the hand of one of the Commissioners of Inland Revenue. *Birth, Marriage, or Death Registrars*.—Certified copies of entries in the registers of births, marriages, and deaths, made pursuant to "The Births and Deaths Registration Act, 1836" (6 & 7 W. 4, c. 86), as amended by "The Births and Deaths Registration Act, 1874" (37 & 38 V. c. 88), § 32 (cited ante, § 1504 n. 2), are, by § 38 of the first-named Act, if purporting to be sealed or stamped with the seal of the register office, to be received as evidence of the birth, death, or marriage to which the same relate, without any further or other proof of such entry; and no certified copy, purporting to be given in the said office, shall be of any force or effect which is not sealed or stamped as aforesaid. See, also, § 35, cited ante, § 1504, n. 2, which authorises the

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clergyman, superintendent registrar, and other officers, to give certified copies of the *local registers*; but as the Act contains no provision for making such copies evidence, it may be doubtful whether they would be admissible, were it not for the Act of 14 & 15 V. c. 99 ("The Evidence Act, 1851"), § 14, cited ante, § 1599A. See *R. v. Mainwaring*, 1856, 26 L. J. M. C. 10; *R. v. Weaver*, 1873, L. R. 2 C. (R. B. 85. So, also, the register-books kept under "The Registration of Burials Act, 1864" (27 & 28 V. c. 97), §§ 5, 6, are provable by certified copies. Entries in the non-parochial registers of births, baptisms, marriages, deaths, and burials, which are deposited in the office of the registrar-general, are provable, under 3 & 4 V. c. 92, § 9, in all civil proceedings by means of certified extracts purporting to be stamped with the seal of the said office; every such extract must describe the register or record from which it is taken, and express that it is one of the registers or records deposited in the general register office under that Act; and any party intending to use such extract in evidence must comply with the regulations as to notice contained in §§ 11—16 of the Act; but in all criminal cases the original register must be produced. The same rules have been extended to the registers deposited under 21 & 22 V. c. 25 ("The Births and Deaths Registration Act, 1858"), by § 3 of that Act. Certified copies are also admissible to prove entries in the registers, muster-rolls, and pay-lists transmitted to the registrar-general of births and deaths in England, in pursuance of "The Registration of Births, Deaths, and Marriages (Army) Act, 1879" (42 V. c. 8); the registers of the marriages of British subjects in foreign countries, which, since the 28th of July, 1849, have been kept by British consuls, and certified copies of which are annually transmitted through one of the secretaries of state to the registrar-general, formerly under 12 & 13 V. c. 68, §§ 11, 12, 18, and now under "The Foreign Marriage Act, 1892" (55 & 56 V. c. 23); the registers of births and deaths in Ireland (26 & 27 V.

c. 11, § 5, Ir.); and the register of marriages in Ireland, deposited in the general register office at Dublin (7 & 8 V. c. 81 ("The Marriage (Ireland) Act, 1844"), §§ 52, 71. This last section is the same as § 38 of 6 & 7 W. 4, c. 96 ("The Births and Deaths Registration Act, 1836"), the substance of which is above set out. See, also, 26 & 27 V. c. 90, Ir.). So, the statute passed in 1854 for the better registration of births, deaths, and marriages in Scotland, 17 & 18 V. c. 80 ("The Registration of Births, Deaths, and Marriages (Scotland) Act, 1854"), by § 58, enacts, that "every extract of any entry in the register-books to be kept under the provisions of this Act, duly authenticated and signed by the registrar-general, if such extract shall be from the registers kept at the general registry office, or by the registrar, if from any parochial or district register, shall be admissible as evidence in all parts of her Majesty's dominions, without any other or further proof of such entry." As "The Documentary Evidence Act, 1845" (8 & 9 V. c. 113), does not extend to Scotland, it would seem to be still necessary to prove the signatures and official characters of the persons signing these extracts. See ante, § 7. As to irregular Scotch marriages, the Act 19 & 20 V. c. 96 ("The Marriage (Scotland) Act, 1856"), § 2, enacts, in substance, that any certified copy of the entry of any irregular marriage in the Scottish register of marriages, shall, if signed by the registrar, be received in evidence of such marriage, and of the residence in Scotland required by the Act, in all courts in the United Kingdom and dominions thereunto belonging. The signature of the registrar seems, in this case also, to require proof. *Board of Agriculture: see Inclosures and Tithes. Building Societies' rules*, by § 20 of "The Building Societies Act, 1874" (37 & 38 V. c. 42), may be proved by "a printed copy certified by the secretary or other officer of the society to be a true copy of its registered rules." *Cab Licences: see Public Conveyances. Charity Commissioners.*—By 16 & 17 V. c. 137,

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§ 8, the minutes of the proceedings of these commissioners, and all orders, certificates, and schemes made or approved by them under that Act, are provable by copies purporting to be extracted from the books of the board, and to be certified by the secretary. See, also, 18 & 19 V. c. 124, §§ 4 and 5, cited ante, n. 4 to p. 10. *Common Lodging-Houses*.—All entries made in the registers of common lodging-houses kept under "The Public Health Act, 1875" (38 & 39 V. c. 55), are, by § 76 of that Act, provable by copies certified to be true by the clerk of the local authority. See, also, the Scotch Act, 30 & 31 V. c. 101, § 61. *Companies*.—The order of a general meeting of any company subject to the provisions of "The Companies Clauses Consolidation Act" (8 & 9 V. c. 16), authorising the borrowing of any money, is, by § 40 of the Act, provable by a copy certified to be true by one of the directors or by the secretary. The reports of inspectors appointed under "The Companies Act, 1862" (25 & 26 V. c. 89), are, by § 61, provable by copies authenticated by the seal of the company whose affairs have been inspected; and copies or extracts from documents kept by the registrar of joint stock companies, certified under the hand of the registrar or his authorised substitute, and sealed with the seal of office, are receivable in evidence. See 25 & 26 V. c. 89, § 174, rr. 4, 5, 8; and 40 & 41 V. c. 26, § 6. *Copyright*.—Certified copies are admissible to prove the contents of the book kept at the Hall of the Stationers' Company, wherein are registered the proprietorships and assignments of copyright in books, and in dramatic and musical pieces, whether printed or in manuscript, and licences affecting such copyright (5 & 6 V. c. 45 ("The Copyright Act, 1842"), § 11, cited ante, § 1504, n. 2; and 7 & 8 V. c. 12 ("The International Copyright Act, 1844"), § 8); and the register of proprietors of copyright in paintings, drawings, and photographs, which is also kept at Stationers' Hall (25 & 26 V. c. 68 ("The Fine Arts Copyright Act, 1862"), §§ 4, 5). "The Deeds of

Arrangement Act, 1887" (50 & 51 V. c. 57) by § 11 provides that a copy or extract of a deed registered under the Act purporting to be an office copy or extract shall in all courts "be admitted as *prima facie* evidence thereof"; not only is such a copy or extract evidence of the contents of the deed but also that it was duly executed by the debtors on the date appearing on the office copy. *Re Slater*, 1898, 76 L. T. 704. "The Diseases of Animals Act, 1894."—Orders or regulations of a local authority under this Act (57 & 58 V. c. 57) may, by § 37 thereof, be proved by the production of a newspaper purporting to contain a copy of them as an advertisement, or by the production of a copy purporting to be certified as a true copy by the clerk of the local authority. *Drainage (Ireland)*.—Orders made by the Commissioners of Public Works in Ireland, by virtue of "The Drainage Maintenance Act, 1866" (29 & 30 V. c. 49, Ir.), are, by § 20, provable by copies purporting to be sealed by the Commissioners. *Ecclesiastical Documents*.—All deeds of exchange made by ecclesiastical corporations under the provisions of the Act for facilitating the exchange of lands lying in common fields, and all leases and other instruments made under the Act for enabling incumbents of ecclesiastical benefices to demise their lands on farming leases, which are respectively entered in the proper ecclesiastical registry, may be proved by office copies certified under the hand of the registrar or his deputy (4 & 5 W. 4, c. 30, §§ 10, 11; 5 & 6 V. c. 27, § 14); all counterparts of leases and other instruments deposited with the Ecclesiastical Commissioners for England under the provisions of the Act enabling ecclesiastical corporations to grant leases for long terms, are provable by office copies certified under the seal of the commissioners (5 & 6 V. c. 108 ("The Ecclesiastical Leasing Act, 1842"), § 29). "The Explosives Act, 1875."—Licences and rules confirmed or made under this Act may be proved by copies certified by a government inspector. See 38 & 39 V. c. 17, § 60. *Fisheries (Ireland)*.—Licences

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granted by the inspectors of Irish fisheries for the formation of oyster-beds are provable by copies testified under the hand of the respective clerks of the peace with whom true copies of the originals shall have been lodged. See 29 & 30 V. c. 97, § 7, *Ir.*, amended by 32 & 33 V. c. 92, *Ir.* *Highways Districts*: see *Justices' Orders*. *Inclosures*.—The awards and orders made or confirmed by the Board of Agriculture, and other instruments proceeding from their board, may be proved by copies purporting to be sealed with the seal of the board (52 & 53 V. c. 30 ("The Board of Agriculture Act, 1889"), §§ 2—6); the copies of the confirmed awards of the same board, which are deposited with the clerk of the peace of the county where the lands inclosed are situate, are provable by copies or extracts "signed by the clerk of the peace or his deputy, purporting the same to be a true copy" (8 & 9 V. c. 118 ("The Inclosure Act, 1845"), § 146. See, also, 41 G. 3, c. 109 ("The Inclosure (Consolidation) Act, 1801"), § 35; and 3 & 4 W. 4, c. 87, § 24). The powers and duties of the Land Commissioners are, by "The Board of Agriculture Act, 1889" (52 & 53 V. c. 30), transferred to the Board of Agriculture thereby established. This Act repeals § 2 of the 8 & 9 V. c. 118; and by § 7, orders, licences, or other instruments issued by the board may be proved by means of documents purporting to be such orders, licences, or other instruments, and sealed or signed as there directed. *Industrial Schools*.—Rules of such schools are provable by printed copies purporting to be rules approved in writing by a secretary of state, and to be signed by the inspector of such establishments (29 & 30 V. c. 118, § 29; 31 & 32 V. c. 25, § 23, *Ir.*). As to orders of detention in such schools see *Justices' Orders*. *Justices' Orders*.—Orders of detention in industrial schools, which must be signed by two justices or a magistrate, may be proved by copies purporting to be certified by the clerk to the justices or magistrate by whom the same were made (29 & 30 V. c. 118, § 24; 31 & 32 V. c. 25, § 18, *Ir.*);

but warrants of detention in reformatory schools, cannot, it seems, be proved by copies (see 29 & 30 V. c. 117, § 33; and 31 & 32 V. c. 59, § 29, *Ir.*); and the orders of justices for forming a highway district are, by 27 & 28 V. c. 101, § 12, provable by copies certified by the clerk of the peace. *Inland Revenue Books*: see 12 & 13 V. c. 1, § 6, and 43 & 44 V. c. 19. *Ireland*.—As to proof of births &c. in, see *supra*, tit. *Birth, &c. certificates*. As to valuations of property in, see *infra*, tit. *Valuations*. *Land Commissioners*: see *Inclosures*. "The Licensing Act, 1872."—The registers of licences kept in pursuance of this Act are receivable in evidence of the matters required to be entered therein, and the entries therein are provable by copies certified to be true, and purporting to be signed by the clerk of the licensing justices (35 & 36 V. c. 94, § 58; see, also, 37 & 38 V. c. 69, §§ 35, 36, *Ir.*). *Loan Societies' Rules* may be proved either by the book in which they are entered, or by the transcript deposited with the clerk of the peace, or town clerk, or by an examined copy of such transcript, or by a copy certified by the barrister appointed for that purpose (3 & 4 V. c. 110 ("The Loan Societies Act, 1840"), § 7; 26 & 27 V. c. 56). *London Cab Licences*: see *Public Conveyances*. *Lunacy*.—The orders made by a judge in lunacy in matters in lunacy, and the reports of the masters in lunacy, confirmed by fiat, may, under § 144 of "The Lunacy Act, 1890" (53 V. c. 5), be proved by office copies purporting to be signed by a master, and to be sealed or stamped with the seal of his office, and under the same section certificates in lunacy may also be proved by office copies. A variety of other documents filed in lunacy and enumerated in the Lunacy Orders, 1883, Ord. CIX., may be proved by office copies made by the officers in the masters' office. The licences, orders, and instruments granted, made, issued, or authorised by the Commissioners in Lunacy in pursuance of "The Lunacy Act, 1890," may be proved by copies purporting to be sealed with the seal of the commission (53 V. c. 5).

§ 152). *Metropolitan Public Carriages Licences*: see *Public Conveyances*. *Naturalization*.—Entries in the registers authorised to be made in pursuance of "The Naturalization Act, 1870" (33 & 34 V. c. 60), must, under § 12, sub-s. 4, be proved by such certified copies as may be directed by one of the secretaries of state. *Newspaper Proprietors Register*.—Copies of entries in this register, which is kept by the registrar of joint stock companies, certified by the registrar or his deputy, or under the official seal of the registrar, are in all proceedings sufficient *prima facie* evidence of all matters thereby appearing. See 44 & 45 V. c. 60, § 15. *Parliamentary Elections*.—Documents relating to the election of members of Parliament, deposited with the clerk of the Crown in Chancery (see ante, § 1504, n. 2, sub voce "Ballot"), when admissible in evidence at all, may, by 35 & 36 V. c. 33, Sched. I. Part 1, r. 42, be proved by office copies issued by such clerk. *Patent Office*.—By 46 & 47 V. c. 57, § 89, registers and books kept at the Patent Office, and patents for inventions, specifications, disclaimers, and all other documents in that office, are provable by printed or written copies or extracts purporting to be certified by the comptroller, and sealed with the office seal. § 100 of the same Act provides that copies of all specifications, drawings, and amendments left at the Patent Office shall be transmitted to Scotland, Ireland, and the Isle of Man, and that certified copies of or extracts from such documents shall be admitted in evidence in all courts in those places without further proof. *Poor Law*.—"The Poor Law Amendment Act, 1844" (7 & 8 V. c. 101), § 69, provides that the minutes of the orders given by any board of guardians or district board, respecting any complaint, claim, or application made to them, may be proved by a copy purporting to be signed by the chairman of the board, and to be sealed with their seal, and to be countersigned by their clerk. *Post Office Books*. See *Mortimer v. McCallan*, 1840 (Lord Abinger); *Fulker v. Fotch*, 1695. "*The Public Health Act*, 1875."—Orders and resolutions

of the local authorities under this Act, or of their committees or joint boards, may be proved by copies purporting to be signed by the chairmen of their respective meetings (38 & 39 V. c. 55, Sched. I. r. 1, sub-r. 10, and r. 2, sub-r. 8). *Public Conveyances*.—Entries in the books kept at the office of the Commissioners of the Police of the Metropolis, as to the particulars of the licences granted to the drivers, conductors, and watermen of metropolitan public carriages, may, under 6 & 7 V. c. 86 ("The London Hackney Carriage Act, 1843"), § 16, be proved by copies purporting to be certified by the persons having the charge of the books (see, also, 16 & 17 V. c. 33 ("The London Hackney Carriage Act, 1853")); and 32 & 33 V. c. 115, §§ 6, 8, 11, 15). The Act 16 & 17 V. c. 112, § 12, as to licences granted to drivers and conductors of public carriages in Dublin, is somewhat similar. The duplicates or copies of stage carriage licences, filed in the office of Inland Revenue, whence the licences issue, are provable by copies purporting to be certified under the hand of one of the Commissioners of Inland Revenue, or of the officer by whom the licence has been granted, or of some other persons appointed and authorised by the commissioners in that behalf (12 & 13 V. c. 1, § 16; see 10 & 11 V. c. 42). *Railways*.—The plans and books of reference deposited by railway companies with the clerks of the peace, may be proved by copies or extracts certified by those officers (8 & 9 V. c. 20, § 10; see post, § 1637). *Reformatory School Rules* are provable by copies purporting to be signed by the inspector of such establishments (29 & 30 V. c. 117, § 33; 31 & 32 V. c. 59, § 29, Ir.). As to orders of detention in such schools, see *Justices' Orders*. *Ships*.—Under "The Merchant Shipping Act, 1894" (57 & 58 V. c. 60), register books, certificates of registry, indorsements on such certificates, and declarations in respect of British ships (§ 64, sub-s. 2); a copy or transcript of the register of British ships kept by the registrar-general of shipping and seamen (§ 64,

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sub-s. 3); certificates of competency (§ 100); statements of changes in his crew sent by a master of a foreign-going ship to a superintendent (§ 117); releases of seamen's wages (§ 136, sub-s. 3); submission to, or awards of, superintendents as to any questions between a master or owner and any of his crew (§ 137, sub-s. 2); duplicate agreements or lists of crew in cases where ship is lost (§ 174, sub-s. 3); certificates of amount paid for expenses attendant upon illness of seamen (§ 208); official log-books (§ 239, sub-s. 6); certificates of execution of bonds given by master of emigrant ship (§ 310, sub-s. 2); certificates of expenses incurred in respect of wrecked passenger, or forwarding a passenger (§ 334, sub-s. 2); certificates of tonnage of fishing-boats (§ 371, sub-s. 3); decisions of superintendents of disputes between owners, skippers, and seamen of fishing-boats (§ 387, sub-s. 2); indorsements of superintendents on indentures of apprentices, and agreements with boys (§ 395, sub-s. 4); registers of certificated skippers and second hands (§ 416); records of draught of water of sea-going ships (§ 436, sub-s. 2); reports of proceedings of naval courts (§ 484); valuations of property in respect of which salvage claims are made by valuers appointed by receiver of district where such property is (§ 551); depositions previously made, when witness cannot be produced (§ 691); and documents purporting to be made, issued, or written by or under the direction of the Board of Trade (§ 719),—are, by § 695, on their production from the proper custody, admissible in evidence, and a copy of any such document or extract therefrom is also so admissible, if proved to be an examined copy or extract, or if it purports to be signed and certified as a true copy or extract; and by § 695, sub-s. 2, of "The Merchant Shipping Act, 1894" (57 & 58 V. c. 60), a copy of or extract from any document declared by the Act to be admissible in evidence is made also evidence when it is proved to be an examined copy or extract, or if it purports to be signed and certified as a true copy or extract by

the officer having the custody of the original; and by § 256, sub-s. 1, of "The Merchant Shipping Act, 1854" (57 & 58 V. c. 60), all the documents therein referred to are to be deemed public records of documents within the meaning of "The Public Record Office Acts, 1837 (1 & 2 V. c. 94) and 1877 (40 & 41 V. c. 55)," and those Acts, where applicable, apply to such documents in all respects as if specifically referred to therein. The regulations for preventing collisions at sea, and the rules concerning lights, fog signals, and steering and sailing (as to which, so far as regards British ships and boats, see Order in Council of 11th Aug., 1854, which came into operation 1st Sept., 1884, and so far as regards ships of certain foreign countries, Order in Council of 14th Aug., 1879, which is set out L. R. 4 P. D. 241, and 49 L. J., Orders and Rules, p. 1) may be proved by the production either of the Gazette in which the Order in Council concerning them is published, or of a copy of such regulations purporting to be signed by the secretary or assistant-secretaries of the Board of Trade; and the Board of Trade is bound to furnish a copy of the collision regulations to any master or owner of a ship who applies for it (see 57 & 58 V. c. 60, § 419). *Stage Carriage Licences*: see *Public Conveyances. Tithes*.—All agreements, and awards, apportionments, maps, or plans (Giffard v. Williams, 1869, 38 L. J. Ch. 597) confirmed by the Tithe Commissioners, who, with certain other commissioners, under § 42 of "The Settled Land Act, 1882" (45 & 46 V. c. 38), became and were styled the Land Commissioners for England, and other instruments proceeding from their board, are provable by copies purporting to be sealed or stamped with the seal of the board (6 & 7 W. 4, c. 71 ("The Tithe Act, 1836"), § 64, amended by 52 & 53 V. c. 30). The tithe commutation maps are not made evidence by any Act of the boundaries of lands as between two proprietors: *Wilberforce v. Hearfield*, 1877, 5 Ch. D. 709; but they may be admissible sometimes on questions of general public right. See *Smith v. Lister*.

§§ 1602—7. The mode of proof afforded in these cases has been much simplified by the Documentary Evidence Act of 1845; and if the certified copies respectively *purport* to be duly signed or sealed, or otherwise authenticated in the manner pointed out by statute, they will in almost every case be now admitted in evidence, without proof of the seal, the signature, or the official character of the party certifying.¹

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§§ 1608—10. An important instance in which special legislation has enabled documents to be proved by copies arises in the case of bankers' books. The inconvenience caused to bankers by constantly having their clerks subpoenaed to produce the books of the firm in courts of justice was felt to be so great that by the Bankers' Books Evidence Act, 1879,² it was in substance enacted as follows:—1. Subject to the provisions of the Act, a copy of any entry in a banker's book,—which term includes ledgers, day books, cash books, account books, and all other books used in the ordinary business of the bank,³—shall, in all legal proceedings, civil or criminal, including arbitrations,⁴ and for or against any one,⁵ be received as *prima facie* evidence of such entry, and of the matters, transactions and accounts therein recorded.⁶ But such copy

1895, 64 L. J. Q. B. 154. The powers and duties of the Land Commissioners are now transferred to the Board of Agriculture, as to proof of whose orders or other instruments see ante, under *Inclusures*. *Trade Marks*.—By 5 Ed. 7, c. 15, § 50, printed or written copies, or extracts of or from the register, purporting to be certified by the Registrar and sealed with the seal of the Patent Office, are admissible in evidence; and by § 51, a certificate purporting to be under the hand of the Registrar as to any entry, matter or thing which he is authorised by the Act to make or do is *prima facie* evidence thereof. *Valuations*.—The valuations of rateable property in Ireland, and all field-books and documents relating thereto, are provable by copies or extracts purporting to be signed by the commissioner of valuations, or by his deputy (23 & 24 V. c. 4, § 9, *Ir.*); or, for the purposes of any proceeding in any Civil Bill Court, by the clerk of the union in the

rate-book of which the valuation appears (40 & 41 V. c. 56, § 32, *Ir.*); the valuation lists of property in the Metropolis may, under § 64 of "The Valuation (Metropolis) Act, 1869" (32 & 33 V. c. 67), be proved by duplicates or copies certified by the clerk of the assessment committee that approved them. See, also, "The Local Government Act, 1888" (51 & 52 V. c. 41). For a list of further cases in which evidence may be given by certificates, or certified copies of documents, see post, § 1611, n.

¹ 8 & 9 V. c. 113, § 1; cited ante, § 7.

² 42 & 43 V. c. 11; repealing (by § 2, now itself repealed by "The Statute Law Revision Act, 1894" (57 & 58 V. c. 56)) an earlier Act on the same subject (39 & 40 V. c. 48), passed in 1876.

³ 42 & 43 V. c. 11, § 9.

⁴ § 10.

⁵ *Harding v. Williams*, 1880, 14 Ch. D. 197.

⁶ § 3.

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cannot be received unless proof be given that the book was, at the time of the making of the entry, one of the ordinary books of the bank, and is in the custody or control of the bank, and that the entry was made in the ordinary course of business.¹ Such proof may be given by a partner or officer of the bank, and either orally or by affidavit.² The copy must also be an *examined* copy, and proof of that fact “*shall* be given by some person who has examined the copy with the original entry,” and *may* be given either orally or by affidavit.³ The statute also enacts,⁴ that “A banker or officer of a bank shall not, in any legal proceeding to which the *bank is not a party*, be compellable to produce any banker’s book,” or to appear as a witness to prove the matters therein recorded, unless by order of a judge⁵ made for special cause.⁶ By another section⁷ the court or judge is empowered,⁸ on the application of any party to a legal proceeding, to order⁹ “that such party be at liberty to inspect and take copies of any entries in a banker’s book for any of the purposes of such proceedings;” under this section the court or judge has power, in a legal proceeding in England to order inspection and copies of any entries in a banker’s book in either of the other divisions of the United Kingdom; ¹⁰ any order under the section may be made with or without summoning the bank or any other party,¹¹ “and shall be served on the bank three clear days¹² before the same is to be obeyed, unless the court or judge otherwise directs.” This jurisdiction to order inspection is exercised in conformity with the

¹ § 4.

² *Id.*

³ § 5.

⁴ § 6.

⁵ This term includes the judge of a county court with respect to any action in such court: § 10.

⁶ The costs of such an order are “in the discretion of the court or judge”: § 8.

⁷ § 7.

⁸ As to when this power will be exercised, see *Perry v. Phosphor Bronze Co.*, 1894, 71 L. T. 854.

⁹ See *Davies v. White*, 1884, 53 L. J. Q. B. 275; as to what affidavit will be required in support of an application for an order under the Act.

¹⁰ *Kissam v. Link*, 1896, 1 Q. B. 574.

¹¹ Although an order to inspect may be granted *ex parte*, and without evidence, in any *civil* proceeding, the person whose account is to be inspected should, however, generally be served with notice of the application: *Arnott v. Hayes*, 1887, 36 Ch. D. 731 (C. A.). Such order ought, moreover, to be limited to the time which covers the dispute (*Cotton, L.J.* and *Bowen, L.J.*). A person against whom such an order has been made is entitled to seal up such parts of the books which are the subject of the order as he swears to be irrelevant to the matters in issue: *Parnell v. Wood*, [1892] P. 137 (C. A.).

¹² Exclusive of Sunday, Christmas Day, Good Friday, and any Bank Holiday: § 11.

general law as to discovery, therefore an order for the inspection of entries, which the party swears to be irrelevant, will not be made,¹ Although the section authorises an order to inspect entries relating to an account kept in the name of a person who is not a party to the action,² such an order will, in general, only be made where they are entries in an account which is in form or substance the account of one of the parties to the litigation.³ The statute applies to all ordinary banks, savings banks, post office savings banks,⁴ and companies carrying on business as bankers to which the Companies Acts, 1862 to 1880, apply, which have duly furnished to the registrar of joint-stock companies the prescribed lists and summaries;⁵ and it endeavours⁶ to facilitate the proof of "any person, persons, partnership, or company" being included within any one of these categories.

§ 1611. Besides the instance just referred to and the cases of public books and registers the Legislature has in many cases enacted that evidence may be given by means of certificates, or of certified copies of, or extracts from, documents. It will suffice, in this place, to mention a few of the matters of most frequent occurrence which are so provable.⁷

¹ *South Staffordshire Tramways Co. v. Ebbsmith*, [1895] 2 Q. B. 669.

² *Howard v. Beal*, 1889, 23 Q. B. D. 1.

³ *Pollock v. Garle*, [1898] 1 Ch. 1, and see *South Staffordshire Tramways Co. v. Ebbsmith*, *supra*.

⁴ § 9.

⁵ 45 & 46 V. c. 72, § 11, sub-s. 2.

⁶ By § 9, which is as follows:—"In this Act the expressions 'bank' and 'banker' mean any person, persons, partnership, or company carrying on the business of bankers, and having duly made a return to the Commissioners of Inland Revenue, and also any savings bank certified under the Acts relating to savings banks, and also any post office savings bank. The fact of any such bank having duly made a return to the Commissioners of Inland Revenue, may be proved in any legal proceeding, by production of a copy of its return verified by the affidavits of a partner or officer of the bank, or by the production of a copy of a

newspaper purporting to contain a copy of such return published by the Commissioners of Inland Revenue; the fact that any such savings bank is certified under the Acts relating to savings banks may be proved by an office or examined copy of its certificates; the fact that any such bank is a post office savings bank may be proved by a certificate, purporting to be under the hand of her Majesty's Postmaster-General, or one of the secretaries of the post office."

⁷ Some (but not all) of the other matters as to which proof is allowed to be given in the way mentioned in the text, are the following: *Adulteration*: see *The Sale of Food and Drugs Act*, 1875, and 1899: *Analysts' Certificates*: see *The Sale of Food and Drugs Acts*, 1875 and 1899. "*The Army Act*, 1881" (41 & 45 V. c. 58), §§ 157, 162, sub-s. 6, provides that no person subject to military law, who has been acquitted or convicted of any offence, either by a court-martial or by a

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competent civil court, is liable to be tried again by a court-martial in respect of the same offence; and by § 164, the officer having the custody of the records of a civil court in which any person has been tried must, if required by the commanding officer of the accused, or by any other officer, transmit to him a certificate setting forth the offence for which the accused was tried, together with the judgment, whether of conviction or acquittal; and any such certificate is to be "sufficient evidence of the conviction and sentence or of the acquittal." This section has been applied to the reserve forces by 45 & 46 V. c. 48, § 27; and to the militia by "The Militia Act, 1882" (45 & 46 V. c. 49), § 44, sub-a. 1. *Birth Certificates*: see *infra*, "*Certified Extracts from Registers*." Under "*The Building Societies Acts, 1874 and 1877*" (37 & 38 V. c. 42, § 20; 40 & 41 V. c. 63, § 6, and Sched. of Forms), any certificate of incorporation or of registration, or other document relating to a building society, and purporting to be signed by the registrar, shall, in the absence of any evidence to the contrary, be received by all courts without proof of the signature. "*The Cemeteries Clauses Acts, 1847*" (10 & 11 V. c. 65), by § 7, empowers two justices to correct any omission, misstatement, or wrong description which it shall appear to them arose by mistakes, respecting any lands, or the owners, lessees, or occupiers thereof, which shall be contained in the special Act, or in the schedule thereto, or in the plans or books of reference relating to the undertaking; and the correction shall be embodied in a certificate which shall state the particulars of the error, and shall along with the other documents to which it relates, be deposited with the clerk of the peace for the county where the lands are situate; and thereupon the undertakers may take the lands or make the words in accordance with such certificate. § 8 further provides that copies of the plans and books of reference, and of the corrections or extracts therefrom, certified by the clerk of the peace in whose custody the documents are, shall be received in all courts of

justice and elsewhere as evidence of their contents. See further, post, § 1637A. *Certified Extracts from Registers of Births, Deaths or Marriages*: As to these, see ante, § 1601, n., sub tit. "*Birth Marriage, or Death Registers*," also as to registers of births, deaths, and burials, post, § 1775; Further, 3 & 4 V. c. 92, by § 9 requires the registrar-general to certify and seal with his official seal all extracts granted by him; and makes all extracts purporting to be so sealed receivable in evidence in all cases; by § 10, requires every extract to describe the register, &c., from which it is taken, and to express that it is one of those deposited in the General Register Office under the Act; and by §§ 11—16, requires every party intending to use in evidence in civil cases a certified copy of a register, to give notice in writing to the other side, at the same time delivering to him a copy of the extract; while by § 17, it is provided that in all criminal cases the original registers shall be produced. Certified copies, sealed or purporting to be sealed with the seal of the General Register Office, are made evidence by § 38 of "*The Registration Act, 1836*" (6 & 7 W. 4, c. 86). The same Act, by § 35, enables the clergyman, superintendent registrar, and other officers to give certified copies of local registers, and these are evidence under § 14 of "*The Evidence Act, 1851*" (14 & 15 V. c. 99, cited ante, § 1599). As to Scotch Marriages, 17 & 18 V. c. 80, § 58, enacts, that every extract from a register book kept under that Act, if authenticated and signed by the registrar-general, when made from registers kept at the General Registry Office, or by the registrar, if made from any parochial or district register, shall be admissible in evidence; but as "*The Documentary Evidence Act, 1845*," does not extend to Scotland, it apparently is necessary to prove the signatures and official characters of the persons signing the extracts. Similar provisions open to the same remark are contained in 19 & 20 V. c. 26, § 2, as to certified copies of irregular Scotch marriages. Marriages of British subjects in foreign countries have, since

28th July, 1849, been kept by British consuls, and certified copies of them annually furnished for the registrar-general, and are evidence by 12 & 13 V. c. 68, §§ 11, 12, 18. And see also *infra* sub tit. "Registers." "The Charitable Trustees Incorporation Act, 1872" (35 & 36 V. c. 24), §§ 1, 6, empowers the Charity Commissioners to grant certificates of incorporation to the trustees of charities established for religious, educational, literary, scientific, or public charitable purposes; and every such certificate is conclusive evidence that all the preliminary requisitions of the Act have been complied with; and the date of incorporation shall be deemed to be that which is mentioned in the certificate. Under "*The Chimney Sweepers Act, 1875*" (38 & 39 V. c. 70), § 14, any entry in the registers of master sweeps, which are required by the Act to be kept by the chief officers of police, may be proved by a copy purporting to be certified as true by the chief officer; and any statement purporting to be signed by him "of the absence of such an entry in any case" is "evidence of the matters therein appearing." "*The Clerical Disabilities Act, 1870*" (33 & 34 V. c. 91).—To render a parson's deed of relinquishment available under this Act, first, the deed must be inrolled in the Inrolment Department of the Central Office (R. S. C. 1883, Ord. LXI. rr. 1, 9); and next, an office copy of it must be recorded by the bishop. The Act then provides (§ 7) that "a copy of the record in the registry of the diocese, duly extracted and certified by the registrar of the bishop, shall be evidence of the due execution, inrolment, and recording of the deed, and of the fulfilment of all the requirements of the Act in relation thereto." Under "*The Colonial Stock Act, 1877*" (40 & 41 V. c. 59), § 18, certain certificates and lists, furnishing particulars of the amount of the debt, the numbers and names of the stockholders, and other matters, and authorised to be given to any stockholder by the registrar of colonial stock, are made admissible in evidence. "*The Consular Marriages Act, 1849*" (12 & 13 V. c. 68), as to marriages since 1st January, 1893,

repealed and superseded by the Foreign Marriage Act, 1892 (55 & 56 V. c. 23) (which see), after authorising British consuls to solemnize and register certain marriages, enacted in § 17, that in every action or suit for forfeiture, and upon every prosecution for perjury, "the declaration and certificate of the consul, under his hand and consular seal, shall be received and taken as good and valid evidence in the law of all facts and matters stated in such declaration and certificate, without its being necessary for the said consul to attend in person to prove the same." "*The Corrupt and Illegal Practices Act, 1883*" (46 & 47 V. c. 51), § 53, sub-s. 3, provides that in any prosecution or action for any offence against the Act, the certificate of the returning officer that the election was duly held, and that the person named in the certificate was a candidate, "shall be sufficient evidence of the facts therein stated." *Costs in Parliamentary Proceedings*: see *Parliamentary Costs, &c. Courts Martial*: see *The Army Act*. "*The Crown Lands Act, 1832*" (2 W. 4, c. 1, § 26; see, also, "*The Crown Lands Act, 1853*," § 6), enacts with respect to all deeds relating to the possessions of the Crown, which are inrolled in the Land Revenue Office, that a memorandum, of inrolment on the deed, purporting to be signed by the keeper of the records and inrolments, or his deputy or assistant, shall be receivable as sufficient evidence, not only of the inrolment, but even of the due execution of the deed, and that, too, without proof of the signature attached to it. The Act. 11 & 12 V. c. 83, §§ 6, 14, contains somewhat similar enactments as to documents inrolled in the Duchy of Cornwall, or in the Duchy of Lancaster, since 31st of August, 1848, and relating to the lands or possessions of the respective Duchies. *Death Registers or Certificates from Registers*: see *infra*, "Registers," and *supra*, "*Certified Extracts, &c.*" "*The Diseases of Animals Act, 1894*" (57 & 58 V. c. 57), provides, by § 48 (sub-s. 1), that "in any proceeding under this Act no proof shall be required of the appointment or handwriting of an inspector

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or other officer of the Board of Agriculture, or of the clerk or an inspector or other officer of a local authority." On an inspector reporting a *cow-shed, field, or other place*, to have been, within ten days, infected with cattle plague, he is to inform the Board of Agriculture, who forthwith inquire into the subject. *Id.* § 5. The certificate of a veterinary inspector that an *animal* is or was affected with disease, is by § 46, sub-s. 5, *conclusive* evidence, in all courts of justice, of the matter certified. "*The Ecclesiastical Dilapidations Act, 1871*" (34 & 35 V. c. 43), §§ 27, 46, 50, makes the certificate of the official surveyor of the diocese conclusive evidence of the due execution of repairs directed by him to be executed. "*The Elementary Education Acts, 1870 and 1873*" (33 & 34 V. c. 75, §§ 64, 83; 36 & 37 V. c. 86, § 24, sub-s. 5), contain special clauses with respect to the proof and admissibility of certificates granted either by the Education Department or by the principal teacher of a public elementary school. "*The Factory and Workshop Act, 1901*" (1 Ed. 7, c. 22), by § 147, sub-s. 3, enacts that a written declaration by the certifying surgeon "that he has personally examined a person employed in a factory or workshop in his district, and believes him to be under the age set forth in the declaration, shall be admissible in evidence of the age of that person." "*The Foreign Marriage Act, 1892*," provides, § 17, as follows:—"All the provisions and penalties of the Marriage Registration Acts, relating to any registrar, or register of marriages, or certified copies thereof, shall extend to every marriage officer, and to the registers of marriages under this Act, and to the certified copies thereof (so far as the same are applicable thereto), as if herein re-enacted, and in terms made applicable to this Act, and as if every marriage officer were a registrar under the said Acts." Under "*The Friendly Societies Act, 1896*" (59 & 60 V. c. 25), § 11, "an acknowledgment of registry" issued by the registrar, on being satisfied that a society has complied with the statutory requirements, and specifying

the designation of the society according to the classification in the Act, is conclusive evidence that the society has been duly registered, unless it be proved that the registry has been suspended or cancelled; and under § 13, sub-s. 1, the registrar shall, on being satisfied that any proposed amendment of a rule of any such society is not contrary to the provisions of the Act, issue to the society an acknowledgment of registry of the same, which shall be conclusive evidence that the same is duly registered. "*The Harbours, Docks and Piers Clauses Act, 1847*" (10 & 11 V. c. 27), contains, in §§ 7, 10, provisions similar to those in §§ 7, 8, of "*The Cemeteries Clauses Act, 1847*," mentioned above, and also in § 26, provides that the chairman of quarter sessions may grant certificates, which shall be conclusive evidence that the works are completed and fit for public use. *Highway Districts: Justices' Orders* for the formation of. See ante, § 1571, n. *Indemnity Certificates* are sometimes granted to witnesses who make full disclosures respecting corrupt practices at parliamentary elections, gaming, and other illegal transactions; and in the event of any ulterior proceedings against such witnesses the certificates constitute a valid defence and will be received in evidence on their mere production, provided that they be drawn up in the proper form, and that they purport to be signed by the persons who are respectively authorised to grant them. See the Acts noticed ante, § 1445, n., and 8 & 9 V. c. 113, § 1, cited ante, § 7. Under "*The Parliamentary Elections Act, 1868*" (31 & 32 V. c. 125), § 33, "the certificate shall be given under the hand of the judge." Under "*The Industrial Schools Act, 1866*" (29 & 30 V. c. 118; see as to Ireland, 31 & 32 V. c. 25, § 24, Ir.), § 30, a certificate purporting to be certified by one of the managers of such a school, or the secretary, or by the superintendent or other person in charge of the school, to the effect that the child therein named was duly received into, and is at the signing thereof detained in, the school, or

has been duly discharged, or otherwise disposed of, shall be evidence of the matters therein stated. In §§ 7, 9, 46, of the same Act, and in §§ 6, 8, 36, of the Irish Act, are contained provisions somewhat similar to those below stated to be contained in §§ 4, 33, of "The Reformatory Schools Act, 1866." "The Industrial and Provident Societies Act, 1876" (39 & 40 V. c. 45), § 7, sub-ss. 7, 10, contains provisions as to proof of the due registration of such societies similar to those in § 11 of "The Friendly Societies Act, 1901." *Judgments*: see *Registrar of Judgments in Ireland*. Under "The Judgment Mortgage (Ireland) Act, 1850" (13 & 14 V. c. 29), §§ 6, 7, in order to prove a judgment mortgage, first, the judgment must be proved in the usual way; next, the affidavit filed when the judgment is entered must be proved by an office, or a certified, or an examined, copy; and, lastly, the due registration of an office copy of this affidavit in the office for registering deeds and wills in Ireland must be proved either by an examined or a certified copy. It seems doubtful whether such last-named copy will be received in evidence unless the notice required by "The Registry of Deeds (Ireland) Act, 1832," § 32, below cited, has been duly given. See *Duncan v. Brady*, 1860, 12 Ir. C. L. R. 171; 13 & 14 V. c. 72, § 9. Under "The Lands Clauses Consolidation Act, 1845" (8 & 9 V. c. 18), §§ 16, 17, the fact that the whole capital has been subscribed, until which has been done no company can put in force its compulsory powers of taking land, may be proved by a certificate under the hands of two justices, granted on the application of the promoters, and the production of such evidence as such justices think sufficient. "The Markets and Fairs Clauses Act, 1847" (10 & 11 V. c. 14), contains, in §§ 7, 8, clauses similar to those in §§ 7, 8, of "The Cemeteries Clauses Act, 1847," above noticed; it also provides in § 32, that two justices may grant certificates, which shall be conclusive evidence that the works are completed and fit for public use. "The

Marriage Acts" (see "The Marriage Act, 1836" (6 & 7 W. 4, c. 85)), § 37; "The Births and Deaths Registration Act, 1837" (7 W. 4 & 1 V. c. 22, § 5; "The Marriages (Ireland) Act, 1844" (7 & 8 V. c. 81), § 43, Ir.), provide that if any action be brought against a party for having vexatiously entered a caveat, "a copy of the declaration of the Registrar-General, purporting to be sealed with the seal of the General Register Office, shall be evidence that the Registrar-General has declared such caveat to be entered on frivolous grounds, and that they ought not to obstruct the grant of the licence, or the issue of the certificate;" and the plaintiff thereupon shall recover costs and damages. "The Marriage and Registration Act, 1856" (19 & 20 V. c. 119), contains, in § 24, provisions somewhat similar to those in § 11 of "The Places of Worship Registration Act, 1855," below mentioned. *Marriage Certificates*: see supra, sub tit. *Certified Extracts from Registers, &c.* "The Naturalization Act, 1870" (33 & 34 V. c. 14), § 12, provides that certificates of naturalization, and of re-admission to British nationality, as well as all declarations authorised to be made under the Act, may be proved by the production of the original documents, or of any copies certified to be true by a Secretary of State, or by some person authorised by such secretary to give them. Under "The Parliamentary Costs Act, 1865" (28 & 29 V. c. 27), §§ 3, 5, "The House of Lords Costs Taxation Act, 1849" (12 & 13 V. c. 78), § 9, and "The House of Commons Costs Taxation Act, 1847" (10 & 11 V. c. 69), § 9, the Clerk of the Parliaments, or Clerk-Assistant, the Speaker, and the Taxing Officer of the Lower House, are respectively authorised to issue certificates of the amount of costs allowed on taxation in respect of private bills; and such certificates are conclusive evidence of the amount of such costs in all legal proceedings, and operate on production as warrants of attorney to confess judgment, unless the defendant has in his statement of defence denied his liability to make any payment in

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respect of them. The signatures to such certificates need not be proved. See 8 & 9 V. c. 113, § 1, cited ante, § 7. See, also, *Williams v. Swansea Canal Navigation Co.*, 1868. L. R. 3 Ex. 158. *Parliamentary Papers*.—The Act to give Summary Protection to Persons employed in the Publication of Parliamentary Papers (3 & 4 V. c. 9), § 1, provides that all proceedings, civil or criminal, against any person for the publication of papers printed by order of Parliament shall be stayed upon the production of a certificate under the hand of the Lord Chancellor, the Lord Keeper, or the Speaker of the House of Lords for the time being, the Clerk of the Parliaments, the Speaker of the House of Commons, or the Clerk of the same House, stating that such papers were published by order of either House. The affidavit verifying such certificate required by the Act is not now necessary. See 8 & 9 V. c. 113, § 1, cited ante, § 7. "*The Midwives Act, 1902*" (2 Ed. 7, c. 17), § 7, provides that a copy of the roll of midwives purporting to be printed by the authority of the Midwives Board or to be signed by the secretary of the Board, shall be evidence in all courts that the women therein specified are certified under the Act, and in the case of any women whose name does not appear in any such copy, a certificate under the hand of the secretary, of the entry of the name of such woman on the roll shall be evidence that such woman is certified. "*The Patents, Designs, and Trade Marks Act, 1883*" (46 & 47 V. c. 57), § 81, provides that the judge before whom any action for infringing a patent shall be tried may "certify that the validity of the patent came in question; and if the court or a judge so certifies, then in any subsequent action for infringement, the plaintiff in that action, on obtaining a final order or judgment in his favour, shall have his full costs, charges, and expenses, as between solicitor and client, unless the court or a judge trying the action certifies that he ought not to have the same." See *Honiball v. Bloomer*, 1834, 24 L. J. Ex. 11. The same statute provides, in § 96, that

any certificate purporting to be under the hand of the Comptroller-General of Patents, Designs, and Trade Marks "as to any entry, matter, or thing, which he is authorised by that Act, or any general rules made thereunder, to make or do, shall be *prima facie* evidence of the entry having been made, and of the contents thereof, and of the matter or thing having been done or left undone." The Comptroller is further directed, in § 49, to "grant a certificate of registration to the proprietor of the design when registered." See as to Trade Marks, "*The Trade Marks Act, 1905*" *infra*. "*The Places of Worship Regulation Act, 1855*" (18 & 19 V. c. 81), § 11, provides that a certificate of the Registrar-General, sealed or stamped with the seal of the General Register office, that at the time or times therein stated, any place certified to him as a place of meeting for religious worship was duly certified and duly recorded as required by the Act, and that at the date of such sealed or stamped certificate the record of such certification remained uncanceled, shall be received in all judicial proceedings as evidence of the several facts therein mentioned without further or other proof. "*The Poor Law Amendment Acts, 1844 and 1848*" (7 & 8 V. c. 101; and 11 & 12 V. c. 110).—§ 69 of the Act of 1848 authorises boards of guardians and district boards to make certificates of the chargeability of any paupers; and if these documents substantially follow the form given in Schedule C. of the Act, and purport to be signed by the chairman of the respective boards, to be sealed with their seals, and to be countersigned by their clerk, they are *prima facie* evidence of the truth of all statements contained therein; and no other proof of chargeability is required for the purpose of making any order of removal or other order, provided such order bear date within twenty-one days after the day of the date of any such certificate. In order to clear up any doubt respecting the admissibility of these certificates, the Act of 1848 further enacts, in § 11, that in any court, and before any justice

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or justices, and for all purposes, a certificate in the form prescribed in Sched. C. of the Act of 1844, and purporting to have been executed in the manner prescribed by that Act, shall be received within twenty-one days from the date thereof as sufficient evidence of the chargeability of the person named therein, unless the contrary be otherwise shown. "*The Railway Clauses Consolidation Act, 1845*" (8 & 9 V. c. 20), authorises the grant of certificates enabling railway companies to modify the construction of roads, bridges, and other engineering works. These certificates now, under 14 & 15 V. c. 64, § 3, issue from the Board of Trade, and are admissible in evidence if they purport to be signed by one of the secretaries or assistant secretaries of the board, or by any other officer appointed by the board to sign documents relating to railways. As to the proof of certificates granted before the last-mentioned Act, see "*The Railways Clauses Act, 1845*" (8 & 9 V. c. 20), §§ 66, 67; and 9 & 10 V. c. 105, §§ 2, 4. "*The Railway Companies Powers Act, 1864*" (27 & 28 V. c. 120, §§ 18, 30); "*The Railway Construction Facilities Act, 1864*" (27 & 28 V. c. 121, §§ 20, 60).—Certificates granted by the Board of Trade under these Acts must be judicially noticed, and are provable by copies published in the London, or Edinburgh, or Dublin Gazette. See, also, "*The Railways (Powers and Construction) Acts, 1864, Amendment Act, 1870*" (33 & 34 V. c. 19). "*The Reformatory Schools Act, 1866*" (29 & 30 V. c. 117), §§ 4, 33, authorises the Home Secretary, by writing under his hand, to certify that any school is fitted for the reception of youthful offenders; and the grant of every such certificate may be proved by the production either of the certificate itself, or of a copy of the same, purporting to be signed by the inspector of reformatory schools, or of the Gazette containing a notice of such grant. The withdrawal of the certificate may also be proved by means of the Gazette. As to proof of the detention of an offender in such schools, see § 33, sub-s. 3, of the Act. The Irish Act of 1868 (31 &

32 V. c. 59, Ir.), contains, in §§ 6, 8, 29 and 36, somewhat similar provisions. The Act to amend the Laws for "*Registration of Assurances of Lands in Ireland*" (13 & 14 V. c. 72, Ir.), provides, in § 47, that copies or extracts provided by the registrar from any document which has been deposited in the register office under the Act, and sealed on each sheet with the seal of the said office, and having written thereon a certificate purporting to be signed by the proper officer of the said office, stating that such copy or extract is an examined copy of, or extract from, a document deposited in the said register, and specifying the book or parcel in which such document is made up, and the number of such documents in such book or parcel, shall be evidence of the facts stated in such certificate, and of the contents of the document deposited in the register office, or of such part thereof as is purported to be extracted. "*The Registry of Deeds (Ireland) Act, 1832*" (2 & 3 W. 4, c. 87), enacts (§ 32), that an office copy of any memorial registered in the register office shall, upon being proved in like manner as an office copy of any other record, be receivable in all judicial proceedings as evidence of the contents of the memorial of which it purports to be an office copy, without the production of the original. But notice in writing of the production of such office copy must be given to the adverse party, who may, by a counter-notice require production of the original, the costs of producing which will, however, have to be paid by either party as the court, or its taxing officer may determine. The Act for the better Regulation of the Office of the Registrar of Judgments in Ireland (13 & 14 V. c. 74, Ir.), § 10, requires the registrar to grant a certificate under his hand of the registry or re-entry of any judgment, or revival, decree rule, order, Crown bond, recognisance, or his pendens, or of any satisfaction, vacate, or quietus in his office, and this certificate is made evidence of any registry or re-entry. An assignment of a judgment in Ireland may be proved by an examined

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copy of the inrolment of the memorial (*Fitzgerald v. Fitzgerald*, 1849, 8 C. B. 492; *Hobhouse v. Hamilton*, 1803, 1 Sch. & Lef. 207; 2 Sch. & Lef. 28; 9 G. 2, c. 5, Ir., amended by "The Statute Law Revision Act, 1888" (51 V. c. 3); 25 G. 2, c. 14, Ir.; 12 G. 3, c. 19, § 3, Ir.), and a certified copy of such inrolment would probably, also, be admissible (see ante, § 1455). "*The Sale of Food and Drugs Act, 1875*" (38 & 39 V. c. 53), § 21, renders certificates given by analysts under the Act admissible in evidence if they purport to be signed by the persons giving them, and they are "sufficient evidence" of the facts therein stated unless the defendant shall require that the analyst shall be called as a witness. Under "*The Sale of Food and Drugs Act, 1899*" (62 & 63 V. c. 51), by § 1, sub-s. 5, upon a prosecution under the section, the certificate of the principal chemist of the government laboratories is "sufficient evidence" of the facts therein stated, unless the defendant requires that the person who made the analysis be called as a witness; and by § 22 the production by the defendant of the certificate of a public analyst is "sufficient evidence" of the facts therein stated, unless the prosecutor requires the analyst to be called as a witness. By § 19, sub-s. 2, and § 20, sub-s. 2, copies of any analyst's certificate proposed to be used must be sent to the other side before the hearing. The certificate of the analyst is not conclusive: see *Hewitt v. Taylor*, [1896] 1 Q. B. 287. As to when the analysts' certificates are admissible under the Acts: see *Tyler v. Kingham and Son*, [1900] 2 Q. B. 413. "*The Towns Improvement Clauses Act, 1847*" (10 & 11 V. c. 34), § 20, contains similar provisions to those in § 7 of "*The Cemeteries Clauses Act, 1847*," above set out. "*The Trade Marks Act, 1905*" (5 Ed. 7, c. 15), by § 51 provides that a certificate purporting to be under the hand of the Registrar as to any entry, matter, or thing which he is authorised by the Act to make or do shall be *prima facie* evidence thereof; and by § 52 all documents purporting to be orders made

by the Board of Trade and to be sealed with the seal of the Board, or to be signed by the secretary, or assistant secretary of the Board, or by any person authorised in that behalf by the President of the Board, shall be received in evidence and shall be deemed to be such orders without further proof, unless the contrary is shown; sub-s. 2 of the same § renders a certificate signed by the President of the Board of Trade that any order made or act done is the order or act of the Board, conclusive evidence of the fact. "*The Trades Union Act, 1871*" (34 & 35 V. c. 31), § 13, sub-s. 5, empowers registrars to issue certificates of registry of trade unions, and such certificates are "conclusive evidence that the regulations of the Act with respect to registry have been complied with." *Title*.—Certificates as to title may be given under either of the following Acts:—Under "*The Declaration of Title Act, 1862*" (25 & 26 V. c. 67; and see, also, 28 & 29 V. c. 88, Ir.), the Chancery Division may (§ 22), after making a declaration of title in favour of any landowner, grant him a certificate under seal setting forth the title so declared, and further stating that the time for appealing has expired, which certificate will be conclusive evidence of the facts therein stated. Under "*The Land Transfer Act, 1862*" (25 & 26 V. c. 53), which first established a registry of title to landed estates, the registrar was directed (see §§ 70, 71) to, upon request, deliver to every registered proprietor a certificate, called a "land certificate," under the seal of the office, and signed by the registrar, and containing (§ 68) "all such particulars as are material or useful for the purpose of manifesting the exact nature of the owner's estate or interest," which certificate was made evidence of the several matters contained therein; and, under particular circumstances, such certificate might be a "special land certificate," in which latter case it was made "conclusive evidence of the title of the registered proprietor to the land as appearing by the record of title." Under "*The Land Transfer Act, 1875*" (38 & 39 V. c. 87), certificates

§§ 1612—14. It so frequently, however, becomes necessary in courts of justice to furnish proof of the trial, conviction, or acquittal of a person who has been charged with an indictable offence, that it is worth while to set out in this place the provisions which Parliament has enacted to facilitate such proof. It is, by Lord Brougham's Evidence Act of 1851,¹ provided that "whenever, in any proceeding whatever," (which term, it is scarcely necessary to state, will include all civil as well as criminal proceedings,²) "it may be necessary to prove the *trial and conviction or acquittal* of any person charged with any indictable offence, it shall not be necessary to produce the record of the conviction or acquittal of such person, or a copy thereof, but it shall be sufficient³ that it be certified or purport to be certified under the hand of the clerk of the court, or other officer having the custody of the records of the court where such conviction or acquittal took place, or by the deputy of such clerk or other officer, that the paper produced is a

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of title, whether absolute, qualified, or possessory, are made "prima facie evidence of the several matters therein contained," and office copies of registered leases are made (§ 80) "evidence of the contents of the lease." Since the date of the commencement of this Act, registrations under the Act of 1862 are no longer made (§ 125). "*The Volunteer Acts, 1863 and 1869*" (26 & 27 V. c. 65, § 29; 32 & 33 V. c. 81, § 5), empower justices to receive proof of a previous conviction by means of a certified copy, in the event of the offender being again charged with buying, selling, pawning, or taking in pawn, any arms, clothing, or other public stores from volunteers. "*The Waterworks Clauses Act, 1847*" (10 & 11 V. c. 17), contains, in §§ 7 and 10, provisions similar to those above stated to be contained in §§ 7 and 8 of "*The Cemeteries Clauses Act, 1847*." In arbitrations under "*The Workmen's Compensation Act, 1897*" (60 & 61 V. c. 37), the Act provides for certificates and reports to be given by medical practitioners, appointed for the purposes of the Act; and in certain cases these certificates are conclusive evidence as to the condition of the workman at the time

of the examination (Sched. 1 (11)). "*The Weights and Measures Act, 1878*" (41 & 42 V. c. 49: see ante, § 144A), requires an account to be kept by the Board of Trade of all local standards verified or re-verified of weights and measures; and by § 37 every indenture of verification or indorsement of re-verification, "if purporting to be signed by an officer of the board, shall be evidence of the verification or re-verification of the weights and measures therein referred to." When a local standard has been compared, as it may be, by a local authority, the justice in whose presence the comparison is made must sign an indorsement on the indenture of verification of that standard, which indorsement must be recorded by the Board of Trade. It will then become "evidence of the local comparison and verification, and a statement of the record thereof, if purporting to be signed by an officer of the board, shall be evidence of the same having been so recorded" (§ 41).

¹ 14 & 15 V. c. 99 ("The Evidence Act, 1851"), § 13.

² *Richardson v. Willis*, 1872, L. R. 8 Ex. 69.

³ See ante, § 1573, ad fin.

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copy of the record of the indictment, trial, conviction, and judgment or acquittal, as the case may be, omitting the formal parts thereof.”¹ It is still necessary to rely on the above provision whenever it becomes requisite to formally prove an *acquittal*. As to other cases, it is further enacted² as follows:—“A previous conviction may be proved in any legal proceeding whatever against any person by producing a record or extract of such conviction, and by giving proof of the identity³ of the person against whom the conviction is sought to be proved with the person appearing in the record or extract of conviction to have been convicted. A record or extract of a conviction shall in the case of an indictable offence, consist of a certificate containing the substance and effect only, omitting the formal part, of the indictment and conviction, and purporting to be signed by the clerk of the court or other officer having the custody of the records of the court⁴ by which such conviction was made, or purporting to be signed by the deputy of such clerk or officer; and in the case of a summary conviction shall consist of a copy of such conviction purporting to be signed by any justice of the peace having jurisdiction over the offence in respect of which such conviction was made, or to be signed by the proper officer of the court by which such conviction was made, or by the clerk or other officer of any court to which such conviction has been returned. A record or extract of any conviction made in pursuance of this section shall be admissible in evidence without proof of the signature or official character of the person appearing to have signed the same. A previous conviction in any one part of the United Kingdom may be proved against a prisoner in any other part of the United Kingdom; and a conviction before the passing of this Act shall be admissible in the same manner as if it had taken place after the passing thereof. A fee not exceeding five shillings may be charged for a record of a conviction given

¹ See 28 & 29 V. c. 18, § 6, cited ante, § 1437, which regulates the proof of certificates of conviction, when produced for the purpose of discrediting witnesses.

² By “The Prevention of Crimes Act, 1871” (34 & 35 V. c. 112), § 18.

³ See *R. v. Levy*, 1858, 8 Cox, C. C. 73. Photography affords an easy mode of establishing this

identity. See *Beamish v. Beamish*, 1876, Ir. R. 10 Eq. 413; *R. v. Tolson*, 1864, 4 F. & F. 73. In matrimonial cases, however, except under very exceptional circumstances, the court will not act upon identification by a photograph only: *Frith v. Frith and Paice*, [1896] P. 74.

⁴ See *R. v. Parsons*, 1866, L. R. 1 C. C. R. 24.

in pursuance of this section. The mode of proving a previous conviction authorised by this section shall be in addition to, and not in exclusion of, any other authorised mode of proving such conviction."¹

§§ 1612-14, 1615-20.

§§ 1615—20. Justices in petty sessions are empowered by "The Summary Jurisdiction Act, 1879,"² to deal summarily with many indictable offences, provided the persons accused consent to such a mode of trial;³ and if, in any such case, the court think fit to dismiss the information, "they shall, if required, deliver to the person charged a copy certified under their hands of the order of such dismissal, and such dismissal shall be of the same effect as an acquittal on a trial on indictment for the offence."⁴ A certificate of dismissal in pursuance either of the provisions of the above Act, or of very similar provisions contained in the Act of 1848,⁵ which regulates the duties of justices out of sessions with respect to summary convictions and orders, is, however, merely intended to afford a convenient mode of proving the dismissal of a charge with which justices have power to deal summarily, and the party acquitted may still establish the fact of his discharge by any other species of legal evidence.⁶ Two justices are by statute⁷ empowered to hear cases of *common assault or battery*; and also cases of aggravated assaults on boys not exceeding fourteen years of age, and on females; and if upon the hearing of any such case they "shall deem the offence not to be proved, or shall find the assault or battery to have been justified, or so trifling as not to merit any punishment, and shall accordingly dismiss the complaint, they shall forthwith make out a *certificate under their hands* stating the fact of such dismissal, and shall deliver such certificate to the party against whom the complaint was preferred."⁸ It is declared⁹ that the person obtaining

¹ The principal Acts here alluded to are, 7 & 8 G. 4, c. 28, § 11; 14 & 15 V. c. 100 ("The Criminal Procedure Act, 1851"), § 22; 24 & 25 V. c. 96 ("The Larceny Act, 1861"), § 116; 24 & 25 V. c. 99 ("The Coinage Offences Act, 1861"), § 37; and 5 G. 4, c. 84, § 24. See, also, 34 & 35 V. c. 112, §§ 9, 20; and *Lond. School Board v. Harvey*, 1879, 4 Q. B. D. 451, cited ante, § 1572.

² 42 & 43 V. c. 49.

³ §§ 10—14.

⁴ § 27, sub-s. 4.

⁵ 11 & 12 V. c. 48 ("The Summary Jurisdiction Act, 1848"), § 14.

⁶ *R. v. Hutchins*, 1880, 5 Q. B. D. 353; 6 Q. B. D. 300.

⁷ "The Offences against the Person Act, 1861" (24 & 25 V. c. 100), §§ 42, 43.

⁸ *Id.* § 44.

⁹ *Id.* § 45.

§§ 1615-
20—
1621a.

such certificate shall be released from all proceedings, civil¹ or criminal,² for the same cause. It seems that a certificate under this Act should specify the ground of dismissal,³ and should be given within a reasonable time after the hearing,⁴ if not before the justices separate:⁵ and it has also been held, that, in order to take advantage of the certificate, the defendant must plead it specially.⁶

§ 1621. In the course of many legal proceedings it becomes necessary to prove the fact of a marriage having been duly solemnized. The usual⁷ mode of proving the fact of a marriage is by putting in a certificate certified to be an extract from such a register as is itself legal evidence of that fact.⁸ The mode of proving the fact of a marriage by a certified extract from such a registrar has already been considered.⁹

§ 1621A. A great many marriages—and this has been more especially the case in comparatively recent years—are solemnized in Nonconformist places of worship. As regards these, it has, since 1855,¹⁰ been directed that the Registrar-General shall, “with respect to any place certified to him as a place of meeting for religious worship, the record whereof remains uncanceled, give to any person demanding the same a certificate, sealed or stamped with the seal of the General Register Office, that, at the time or respective times in such certificate in that behalf stated, the place

¹ See *Tunncliffe v. Tedd*, 1848, 17 L. J. M. C. 67. There, the complainant, after summons, declined to proceed, saying he meant to bring an action, and the justices dismissed the complaint, stating in the certificate that they did so as the complainant offered no evidence. The court held that the certificate was a bar to the action: *S. P. Vaughton v. Bradshaw*, 1860, 30 L. J. C. P. 93; but a joint tortfeasor will not be released: *Dyer v. Munday*, [1895] 1 Q. B. 742.

² See post, § 1710.

³ *Skuse v. Davis*, 1839, 8 L. J. M. C. 75; *Holden v. King*, 1876, 46 L. J. Ex. 75.

⁴ See *Hancock v. Somes*, 1859, 28 L. J. M. C. 198; *Coster v. Hetherington*, 1859, 28 L. J. M. C. 193; *Christie v. Richardson*, 1842, 12 L. J.

Ex. 86.

⁵ Compare *R. v. Robinson*, 1840, 12 A. & E. 672, with *Thompson v. Gibson*, 1841, 10 L. J. Ex. 241.

⁶ *Harding v. King*, 1834, 6 C. & P. 427. See, also, *Skuse v. Davis*, 1839, 8 L. J. M. C. 75; and *R. v. Sidney Westley*, 1868, 11 Cox, C. C. 139.

⁷ Of course, a certificate, though the usual, is not the only, mode of proof in which the fact of a marriage can be established; for instance, it can be shown by “reputation,” as to which see ante, § 172 and § 578.

⁸ As to such registers, see ante, §§ 1591 et seq.

⁹ See ante, § 1600 and n.

¹⁰ By “The Places of Worship Registration Act, 1855” (18 & 19 v. c. 81).

therein described was duly certified and duly recorded as required by this Act, and that, at the date of such sealed or stamped certificate the record of such certification remained uncanceled; and every such sealed or stamped certificate, if tendered in evidence upon any trial or other judicial proceeding in any civil or criminal court, shall be received as evidence of the said several facts therein mentioned; without any further or other proof of the same." The Marriage Registration Act, 1856, contains provisions somewhat similar.¹

§§ 1621a,
1622.

§ 1622. Foreign marriages, too, have not unfrequently to be proved in a court of law. The proof of a foreign marriage which took place some years ago is often a matter of considerable difficulty, and can, indeed, often only be proved by reputation. Foreign registers are comparatively seldom admissible in evidence, and when they are not, certified extracts from them are, of course, equally inadmissible; and the few cases in which such foreign registers are admissible have already been mentioned.² From the year 1892 the law as to foreign marriages has, however, been consolidated in the Foreign Marriage Act, 1892.³ By this Act⁴ "any book, notice, or document" which is directed by the Act to be kept or preserved by a marriage officer under the Act, "shall be of such a public nature as to be admissible in evidence on its mere production from the custody of the officer." The same section of the Act also directs that "a certificate of a Secretary of State as to any house, office,

¹ 19 & 20 V. c. 119, § 24. These are as follow:—"The Registrar-General, on payment to him of the several fees hereinafter mentioned, shall allow searches to be made in the returns so made to him as aforesaid, and shall give to any person demanding the same a certified copy thereof, or extract therefrom, with respect to any place of meeting for religious worship contained therein; and every such certified copy or extract shall be sealed or stamped with the seal of the General Register Office, and when so sealed or stamped as aforesaid, if tendered in evidence upon any trial or other judicial proceeding in any civil or criminal court, shall be received as evidence of the place of meeting therein men-

tioned or described having been at the time in that behalf therein stated duly certified and registered or recorded as by law required, without any further or other proof of the same; and the Registrar-General shall be entitled to demand and receive for every search in the said returns extending over a period of not more than ten years, the sum of one shilling, and for every additional period of ten years the sum of sixpence, and the further sum of two shillings and sixpence for every single certified copy or extract."

² See ante, § 1593.

³ 55 & 56 V. c. 23.

⁴ § 16.

§§ 1622—1631-7. chapel, or other place being or being part of the official house of a British ambassador or consul shall be conclusive."

§§ 1623—30. Proof of certain documents connected with shipping also frequently becomes essential in the course of legal proceedings. The Merchant Shipping Act, 1894, renders certain documents purporting to be issued by the Board of Trade under the Act, admissible in evidence. These provisions have already been set out.¹ By the same statute, every certificate of registry of any British ship purporting to be signed by the registrar or other proper officer, is receivable in evidence as *prima facie* proof of all the matters either contained in or indorsed on it, provided they purport to be authenticated by the signature of a registrar.² So, all certificates, whether of competency or of service, granted to the masters or mates of British ships, or to the engineers of British steam-vessels,³ are provable not only by the production of the originals as issued by the Board of Trade, but also *prima facie* by copies, purporting to be certified by the Registrar-General of Seamen, or his assistant, or by such other person as the Board of Trade appoints for that purpose.⁴

§§ 1631—7. The Companies Acts render various certificates as to matters connected with companies admissible in evidence. Thus *certificates of incorporation*, under the Companies Act, 1862, are of common occurrence, and therefore of practical importance. Every such certificate must set forth under the hand of the registrar, or, in his absence, under the hand of such person as the Board of Trade shall for the time being authorise,⁵ and

¹ 57 & 58 V. c. 60, § 719; set out in note to §§ 1596, title "Merchant Shipping Documents."

² 57 & 58 V. c. 60, § 64, sub-s. 2, cited ante, note to § 1601, title "Ships." See post, §§ 1778-80, n., title "The Merchant Shipping Act." As to certificates of desertion from any ship, see § 229 of the Act.

³ 57 & 58 V. c. 60 ("The Merchant Shipping Act, 1894"), §§ 10, 92, 93, 96, 99, 101, 103, 104, 272, sub-s. 4 (f), and 471.

⁴ 57 & 58 V. c. 60, § 100, enacts, that "(1.) All certificates of competency shall be made in duplicate, one part to be delivered to the person entitled to the certificate, and the

other to be preserved. (2.) Such last-mentioned part of the certificate shall be preserved, and a record of certificates of competency, and the suspending, cancelling, or altering of the certificates, and any other matter affecting them, shall be kept in such manner as the Board of Trade direct by the Registrar-General of Shipping and Seamen, or by such other person as the Board of Trade direct. (3.) Any such certificate, and any record under this section, shall be admissible in evidence in manner provided by this Act." See, also, §§ 101, 103, and 104.

⁵ 25 & 26 V. c. 89, § 174, r. 8.

in either event, as it would seem, under the seal of the registrar's office,¹ that the company is incorporated, and in the case of a limited company, that the company is limited;² and it will then, without proof of the seal, or of the signature, or of the official character of the person signing it,³ be "*conclusive evidence* that all the requisitions of the Act in respect of registration and of matters precedent and incidental thereto have been complied with, and that the association is a company authorised to be registered, and duly registered under the Companies Acts."⁴ Where the certificate purports to have been signed by a person whom the Board of Trade has authorised to act for the registrar, the court, on its being tendered in evidence, will presume that the registrar himself was absent when it was signed, and it is not necessary that that fact should either be stated on the face of the document or be proved aliunde.⁵ The certificate will be equally admissible in evidence to whomsoever it may have been given, and the registrar, on payment of 5s., is bound to issue one to any person who may apply for it.⁶ Moreover, any copy "certificate of the incorporation of any company given by the registrar, or by any assistant registrar for the time being, shall be received in evidence as if it were the original certificate."⁷ A certificate of the registrar of the order and minutes authorising the reduction of the capital of a company is conclusive evidence that all the requisitions of the Act with respect to the reduction of capital have been complied with and that the capital of the company is such as is stated in the minute,⁸ and this is so even if the company had no power to reduce its capital.⁹ A certificate by the registrar of the registration of any mortgage or charge created by a company is conclusive evidence that the requirements as to registration have been complied with.¹⁰ Every *certificate of the proprietorship of shares or stock* in any company registered under the same Act of 1862, must be under

¹ 25 & 26 V. c. 89, § 174, r. 4.

² § 18.

³ 8 & 9 V. c. 113, § 1, cited ante, § 7.

⁴ 63 & 64 V. c. 48, § 1, sub-s. (1).

In re Barned's Banking Co., Peel's case, 1867 (Ld. Cairns), L. R. 2 Ch. 674, 681; Oakes v. Turquand, 1867, L. R. 2 H. L. 325, 354.

⁵ Baker v. Cave, 1857, 26 L. J. Ex. 190.

⁶ 25 & 26 V. c. 89, § 174, r. 5.

⁷ 40 & 41 V. c. 26, § 6.

⁸ 30 & 31 V. c. 131, § 15.

⁹ Ladies Dress Association, Ltd. v. Pulbrook, [1900] 2 Q. B. 705.

¹⁰ 63 & 64 V. c. 48, § 14, sub-s. 6.

§§ 1631-7 the common seal of the company, and must specify the
 —1637a. shares or stock held by any member; and it will then be admitted as *prima facie* evidence¹ of the title of the member to the shares or stock therein specified.² Very similar provisions are contained in the Companies Clauses Consolidation Act³ as to the certificates of the proprietorship of shares in undertakings subject to that Act, and it is only necessary that these last certificates should be sealed with the seal of the company, and should specify the share to which the holder is entitled.

§ 1637A. In connection with companies, certain proceedings may be proved by certificates of justices of the peace. Thus, by the Companies Clauses Act,⁴ where by its special Act a company is restricted from borrowing money on mortgage or bond until a definite portion of their capital has been subscribed or paid up, any justice, upon production to him of the books of the company, and of such other evidence as he shall think sufficient, may grant a certificate that such capital has been subscribed or paid up, and this certificate will be sufficient evidence of the fact stated therein.⁵ Again, under the Lands Clauses Consolidation Act, 1845,⁶ no company can put in force their compulsory powers of taking land until the whole capital has been subscribed; but

¹ See *Shropshire Union Rails. & Can. Co. v. R.*, 1875, L. R. 7 H. L. 496. See, also, *Re British Farmers Pure Lins. Cake Co.*, 1878, 7 Ch. D. 533 (C. A.).

² 25 & 26 V. c. 89, § 31.

³ 8 & 9 V. c. 16. It is by § 11 of this Act provided, that "on demand of the holder of any share, the company shall cause a certificate of the proprietorship of such share to be delivered to such shareholder, and such certificate shall have the common seal of the company affixed thereto; and such certificate shall specify the share in the undertaking to which such shareholder is entitled, and the same may be according to the form in the Schedule A. to this Act annexed, or to the like effect; and for such certificate the company may demand any sum not exceeding the prescribed amount, or, if no amount be prescribed, then a sum not exceeding two shillings and six-

pence." It is by § 12 of the Act enacted, that "the said certificate shall be admitted in all courts as *prima facie* evidence of the title of such shareholder, his executors, administrators, successors, or assigns, to the share therein specified; nevertheless, the want of such certificate shall not prevent the holder of any share from disposing thereof." The form of certificate provided by Schedule A. to the above Act is as follows:—

Form of Certificate of Share.

"No. . . . The Co.

"This is to certify, that A. B., of . . . , is the proprietor of the share No. . . . of 'The . . . Company,' subject to the regulations of the said company. Given under the common seal of the said company, the . . . day of . . . , in the year of our Lord . . ."

⁴ 8 & 9 V. c. 16.

⁵ *Id.* § 10.

⁶ 8 & 9 V. c. 18.

their compliance with this requisite may be proved by a certificate under the hands of two justices, who are authorised to grant it on the application of the promoters, and the production of such evidence as they think sufficient.¹

§ 1638. It is frequently necessary (especially in actions for the recovery of fees) to prove the qualifications of medical men, dentists and veterinary surgeons.² This proof may, in the case of medical practitioners, falling within the Medical Act of 1858, be proved by a copy of the "Medical Register" for the time being, purporting to be printed and published by or at the instance of the Registrar of the General Council of Medical Education and Registration of the United Kingdom, under the direction of such council, or, "in the case of any person whose name does not appear in such copy," by "a certified copy under the hand of the Registrar of the General Council, or of any branch council, of the entry of the name of such person on the general or local register."³ The registration of dentists is provable, under the Dentists Act, 1878,⁴ in a similar manner. Again, the registration of "pharmaceutical chemists and of chemists and druggists" is provable by printed copies of the registers purporting to be published by the registrar appointed under the Pharmacy Acts of 1852 or 1868, and countersigned by the president or two members of the Council of the Pharmaceutical Society.⁵ And here also "the absence of the name of any person from such printed register" is, in most cases,⁶ evidence, till the contrary is made to appear, that such person is not duly registered.⁷ Similar provisions with respect to the proof and admissibility of the printed copies of the register of Veterinary Surgeons are contained in the Veterinary Surgeons Act, 1881.⁸ A copy of the roll of midwives purporting to be printed by

§§ 1637a,
1638.

¹ 8 & 9 V. c. 18, §§ 16, 17. See *Ystalyfera Iron Co. v. Neath and Brecon Rail Co.*, 1873, L. R. 17 Eq. 142.

² See ante, § 1611, n.

³ 21 & 22 V. c. 90, § 27. This section further enacts, that "the absence of the name of any person from the printed copy of the medical register shall be evidence, until the contrary be made to appear, that such person is not registered according to the provisions of this Act."

⁴ 41 & 42 V. c. 33, § 29. See, also, § 11.

⁵ 15 & 16 V. c. 56 ("The Pharmacy Act, 1852"), § 7; 31 & 32 V. c. 121, § 13. The same law prevails in Ireland. See 38 & 39 V. c. 57, § 27, Ir.

⁶ But see 32 & 33 V. c. 117, § 1.

⁷ 31 & 32 V. c. 121, § 13. See, also, 38 & 39 V. c. 57, § 27, Ir.

⁸ 44 & 45 V. c. 62, § 3, sub-s. 2, and § 9.

**§§ 1638—
1639.**

the authority of the Midwives Board or to be signed by their secretary is evidence that the women therein specified are certified under the Midwives Act, 1902,¹ and the absence of the name of any woman from such copy is evidence, until the contrary shall appear, that such woman is not certified; if the name, however, does not appear in the copy, a certificate under the hand of the secretary of the entry of the name of the woman on the roll is evidence that such woman is certified.

§ 1638A. The position of military or naval officers is again, in practice, often needed to be proved. With regard to this, it is provided by the Army Act, 1881, that "an army list or gazette purporting to be published by authority, and either to be printed by a Government printer, or to be issued, if in the United Kingdom, by Her Majesty's Stationery Office, and if in India, by some officer under the Governor-General of India, or the Governor of any Presidency in India, shall be evidence of the status and rank of the officers therein mentioned, and of any appointment held by such officers, and of the corps, or battalion, or arm, or branch, of the service to which such officers belong."²

§ 1639. It, further, is frequently necessary to show that a solicitor is duly certificated. A certificate authorising a solicitor to practise must follow the form given by the Solicitors Act, 1877,³ must be signed by the secretary of the Incorporated Law Society, and must have the annual stamp duties denoted thereon, with the date of the payment of such duties certified by the proper officer of the Inland Revenue Office, "by writing under his hand, or by other sufficient means." Certificates complying with the above requirements will "be deemed the proper stamped certificates required by law to be taken out" by solicitors;⁴ and will, it is presumed, be admissible in evidence without further proof.⁵ The Law List, which purports to be published by the authority of the Commissioners of Inland Revenue, is also made⁶ *prima facie* evidence in all courts, and before all justices and others, that the persons named therein as solicitors, or conveyancers, are duly

¹ 2 Ed. 7, c. 17, § 7.

² 44 & 45 V. c. 58, § 163, sub-s. 1 (d).

³ 40 & 41 V. c. 25, § 16, Sched. I. Form A.

⁴ 23 & 24 V. c. 127, § 18.

⁵ See, also, 29 & 30 V. c. 84 (Ir.).

§§ 28, 32, and Sched. II. of Act, Form A.

⁶ By § 22 of "The Solicitors Act, 1860" (23 & 24 V. c. 127).

certificated; and the absence of the name of any person from such list is evidence, until the contrary be made to appear,¹ that such person is not qualified to practise for the current year.² An extract from the roll of solicitors kept by the registrar,³ certified under the hand of the secretary of the Incorporated Law Society, is also evidence of the facts appearing in such extract.⁴

§§ 1639—
1645a.

§§ 1640—5. Under the Factory and Workshop Act, 1901,⁵ a child or young person under sixteen may not be employed in a factory subject to the Act for more than seven, or, if the certifying surgeon of the district reside more than three miles from the factory, for more than thirteen days, unless the proprietor of the factory has obtained a certificate from the “certifying surgeon for the district;” similar certificates *may* also be obtained by occupiers of *workshops* with respect to children and young persons employed therein.⁶ Such a certificate will probably be regarded as *prima facie* evidence of the age of the persons named therein, of the fitness of such child or young person for such employment. Certificates of fitness given under this Act are probably receivable in evidence without proof, provided they purport to be duly signed by the person granting them.⁷ Whether this be so or not, it is expressly provided that a written declaration by the certifying surgeon “that he has personally examined a person employed in a factory or workshop in his district, and believes him to be under the age set forth in the declaration, shall be admissible in evidence of the age of that person.”⁸

§ 1645A. In several cases where certain facts may by statute be proved by means of certificates it is provided that such certificates shall be “sufficient evidence” of the facts certified to. Some doubt exists as to the meaning of these words, and the Court of Appeal has in two recent cases⁹ declined to decide, as being unnecessary to their actual decision, whether or no these

¹ *R. v. Wenham*, 1866, 10 Cox, C. C. 222.

² 23 & 24 V. c. 127.

³ See 36 & 37 V. c. 66, § 87; 38 & 39 V. c. 77, § 14; 40 & 41 V. c. 57, § 78, *Ir.*

⁴ 23 & 24 V. c. 127, § 22.

⁵ 1 Ed. 7, c. 22, §§ 63, 64.

⁶ *Id.* § 65.

⁷ See, however, 21 & 22 V. c. 90,

§ 37, which enacts, that no medical or surgical certificate “shall be valid, unless the person signing the same be registered under this Act.”

⁸ 1 Ed. 7, c. 22, § 147, sub-s. 3.

⁹ *Board of Trade v. Sailing Ship Glenpark*, [1904] 1 K. B. 682; *Garbutt v. Durham Joint Committee*, [1904] 2 K. B. 514.

§§ 1645a
—1647.

words mean that the certificate is to be considered as conclusive. On the one hand it has been held at *Nisi Prius* that a certificate under section 193, sub-s. 3, of the Merchant Shipping Act, 1894, is conclusive;¹ on the other it has been assumed in more than one case that a certificate under section 21 of the Sale of Food and Drugs Act, 1875, is *prima facie* evidence only.² It seems probable that the true construction is that the certificate, although conclusive if it stands alone, may be contradicted by other evidence: in other words it amounts to *prima facie* evidence.

§ 1646. Inrolment is, it will be recollected,³ *necessary* to perfect certain transactions, while it is *permissible* with regard to others.⁴ The principal transactions of this description appear to be about twelve in number, and are as follows, viz.:—(i.) Conveyances and Leases of Crown Lands, including lands of the Crown in the Duchy of Lancaster,⁵ and those of the Heir Apparent to it, as Prince of Wales, of lands in Cornwall;⁶ (ii.) Bargains and Sales;⁷ (iii.) Conveyance in Mortmain or under the Charitable Trusts Act, 1855;⁸ (iv.) Disentailing Deeds;⁹ (v.) Annuity Deeds; (vi.) Judgments against land in England or Ireland;¹⁰ (vii.) Deeds as to lands in Yorkshire;¹¹ (viii.) Deeds as to lands in Middlesex;¹² (ix.) Title to land under the Land Transfer Acts, 1875 and 1897;¹³ (x.) Deeds executed under the Clerical Disabilities Removal Act, 1870, relinquishing Holy Orders;¹⁴ (xi.) Articles of Clerkship;¹⁵ and (xii.) Bills of Sale¹⁶ and Warrants of Attorney and Cognovits.¹⁷

§ 1647. Inrolments may in most cases—probably in all—be proved, where it is necessary to do so, by the production of office copies; and, as will be seen below, by several Acts of Parliament, such copies are expressly made evidence not only of the inrolment itself, but of the contents of the instruments inrolled.

¹ *Board of Trade v. Sailing Ship Glenpark*, [1903] 2 K. B. 324 (Biggam, J.).

² *Harrison v. Richards*, 1881, 45 J. P. 552; *R. v. Hampshire JJ.*, 1895, 64 L. J. M. C. 158.

³ See ante, § 1119, as to what documents generally *require*, and what *permit*, of inrolment.

⁴ See ante, § 1127.

⁵ Ante, § 1121.

⁶ Id.

⁷ Ante, § 1120.

⁸ Ante, §§ 1119 and § 1127.

⁹ Ante, § 1122.

¹⁰ Infra, § 1652.

¹¹ Ante, § 1127.

¹² Id.

¹³ Ante, § 1126A.

¹⁴ Ante, § 1119.

¹⁵ Ante, § 1126.

¹⁶ Ante, § 1120.

¹⁷ Ante, § 1116A.

§ 1647.

Wherever deeds, memorials, or other instruments are required by statute to be inrolled or registered, the exact mode of proving such inrolment or registration of course depends upon the language of such statute. Under such statutes, however, as a general rule, where, in pursuance of the uniform practice of the office in which the inrolment or registration is made, the officer, at the time of making the proper entry in his books, returns to the party the original instrument, with a certificate or memorandum of inrolment or registration indorsed thereon, such certificate or memorandum will be evidence both of the fact and date of inrolment or registration, without proof being given of the signature or official character of the person signing it.¹ This general rule has, by statute,² been expressly made applicable to the Inrolment Department of the Central Office. By the same Act, copies of documents which are inrolled in this office are also made evidence.³

¹ See *Doe v. Lloyd*, 1840, 10 L. J. C. P. 128; *Kinnersley v. Orpe*, 1779, 1 Doug. 58; *Compton v. Chandless*, 1801, 4 Esp. 19.

² See 12 & 13 V. c. 109; § 18 of which is as follows:—"The Clerk of the said Inrolment Office, or his deputy or assistant, shall, upon request, and payment of the proper fees payable in respect thereof, indorse or write upon every deed, specification, instrument in writing, and document, which at any time heretofore has been, or at any time hereafter shall be, inrolled in the said Inrolment Office, a certificate that such deed, specification, instrument in writing, or document, has been or was inrolled in Chancery, and the day on which such inrolment was made, and shall cause such certificate to be sealed or stamped with the said seal of the Chancery Inrolment Office; and every such certificate purporting or appearing to be so sealed or stamped shall be admitted and received in evidence by all courts and other tribunals, judges, justices, and others, without further proof, and as sufficient *prima facie* evidence that the deed, specification, document, or instrument in writing, therein mentioned was duly inrolled in the Court of Chancery on the day and at the time mentioned in such certificate." Sect. 12 of the

statute is to the same effect, with slight verbal alterations, the most important of which are that the officer spoken of is called "The Clerk of the Petty Bag," with no mention of his deputy or assistant, and that an inrolment is made evidence "as well before either House of Parliament, as also before any committee thereof, as before all courts," &c. It will be recollected that the seal of the Petty Bag Office is judicially noticed (*ante*, § 6). Both the Chancery Inrolment Office and the Petty Bag Office are now parts of "The Inrolment Department of the Central Office." See R. S. C. 1883, Ord. LXI. r. 1, as to Inrolment Office, and R. S. C, Jan. 1889, as to Petty Bag Office.

³ By 12 & 13 V. c. 109, § 17, "Every document or writing sealed or stamped, or purporting or appearing to be sealed or stamped, with the said seal of the Chancery Inrolment Office, and purporting to be a copy of any inrolment or other record, or of any other document or writing of any description whatsoever, including any drawings, maps, or plans thereunto annexed or indorsed thereon, shall be deemed to be a true copy of such inrolment, record, document, or writing, and of such drawing, map, or plan, if any, thereunto annexed, and shall, without further proof, be admissible and admitted in evidence

**§§ 1647a,
1648.**

§ 1647A. The provisions which have been made affording special facilities for giving proof of inrolment in certain particular cases may be now shortly mentioned.

§ 1648. In the first place, as regards all deeds relating to the possessions of the Crown,¹ which are inrolled in the *Land Revenue Office*, it is enacted that a memorandum of inrolment on the deed, purporting to be signed by the Keeper of the Records and Inrolments, or his deputy or assistant, shall be receivable as sufficient evidence, not only of the inrolment but even of the due execution of the deed, and that, too, without proof of the signature attached to it.² The inrolment of deeds relating to lands belonging to either the Duchy of Lancaster or that of Cornwall may also be proved in the manner prescribed by an Act,³ which relates, among other things, to the mode of proving documents inrolled in the respective Duchies of Cornwall and Lancaster. That Act⁴ enacts that "where any deed, certificate, receipt, or other instrument relating to the lands or possessions of the Duchy of

as well before either House of Parliament, as also before any committee thereof, and also by and before all courts, tribunals, judges, justices, officers, and other persons whomsoever, in like manner and to the same extent and effect as the original inrolment, record, document, or writing, could or might be admissible or admitted in evidence, as well as for the purpose of proving the contents of such inrolment, record, document, or writing, and the drawing, map, or plan, if any, thereunto annexed, as also proving such inrolment, record, document, or writing, to be an inrolment, record, document, or writing, of or belonging to the said Court of Chancery; and that such inrolment, record, document, or writing, was made, acknowledged, prepared, filed, or entered, on the day, and at the time, when the original inrolment, record, document, or writing shall purport to have been made, acknowledged, prepared, filed, or entered."

¹ As to what documents as to Crown lands (including those in the Duchies of Cornwall or Lancaster) need to be inrolled, see ante, § 1121.

² By 2 W. 4, c. 1, § 26, "where any deed or certificate, receipt, or

other instrument, which shall appear to have been made, given, or executed under the authority of this Act, or of any Act heretofore passed relating to the possessions of land revenues of the Crown, shall have written thereon a memorandum of its having been inrolled in the said office of records and inrolments, and such memorandum shall purport to be signed by the Keeper of the Records and Inrolments, or by any person acting as his deputy or assistant, such memorandum shall, in the absence of evidence to the contrary, be sufficient proof of the deed, certificate, receipt, or other instrument, having been duly made, granted, given, or executed by the party or parties by whom the same shall purport to have been signed or executed, and of its having been duly inrolled as stated by such memorandum, and of the provisions of the Act, under which the same shall appear to have been made, granted, given, or executed, having been duly complied with; and such memorandum shall be receivable in evidence without proof of the handwriting of the signature thereto." See 16 & 17 V. c. 56, § 6.

³ Viz., 11 & 12 V. c. 83.

⁴ By § 6.

Cornwall, shall have been duly inrolled in the office of the said §§ ~~1648~~
 Duchy, the inrolment in the books of the said office, or an 1650.
 examined copy of such inrolment, or a certificate purporting to
 set forth a true copy of the whole or part thereof, and purporting
 to be signed and certified by the keeper of the Records of the
 Duchy for the time being, shall, in the absence of evidence to
 the contrary, and without producing the original, or calling any
 attesting witness, and (in the case of a certified copy) without
 proof, other than the production of such certificate, that such
 certified copy is in fact a true copy, be admitted by and before
 all courts and justices, and in all legal proceedings, to be proof
 of such original instrument or inrolment thereof, or of so much
 thereof as the said certified copy purports to set forth, and that
 the original was duly made, granted, given, or executed by the
 parties thereto." The same Act¹ extends the provisions just set
 out to all instruments inrolled in the Duchy of Lancaster since
 the 31st of August, 1848. Inrolments of land in the same
 Duchies² may probably also be proved in the manner authorised
 by the general rule already set out.³

§ 1649. In the next place, every bargain and sale passing an
 inheritance or freehold must be inrolled in the Inrolment Depart-
 ment of the Central Office, as already mentioned. Proof of such
 inrolment is given in the way already pointed out.

§ 1650. Thirdly, inrolments of conveyances of lands in mort-
 main,⁴ whether they have been made previously to, or under the
 provisions of, the Mortmain and Charitable Uses Act, 1888,⁵
 require inrolment. Inrolments of conveyances of lands in mort-
 main⁶ may be proved in the manner indicated in the general rule
 set out already.⁷ They may also be proved in accordance with

¹ 11 & 12 V. c. 83, § 14.

² See *Kinnersley v. Orpe*, 1779, 1 Doug. 58.

³ § 1647.

⁴ As to which, see ante, § 1119.

⁵ 51 & 52 V. c. 42, § 4, sub-s. 1.

⁶ As to which, see ante, § 1119.
In Doe v. Lloyd, 1840, 10 L. J. C. P. 128, a deed, requiring inrolment under the Mortmain Act, was produced at the trial, and bore the following indorsement:—"Inrolled in the High Court of Chancery the

17th of December, 1836, being first duly stamped, according to the tenor of the statutes made for that purpose. *D. Drew.*" The court held that, without proving the signature or official character of Mr. Drew, the memorandum was evidence that the deed was inrolled on the day stated, it having been *certified to the court* by an officer of the inrolment office, that the memorandum was in the usual form. See ante, § 21.

⁷ *Supra*, § 1647.

§§ 1650—1652.—the statutory provisions relating to the old Chancery Inrolment Office (now the Inrolment Department of the Central Office).¹ We have already seen ² how deeds inrolled with the Charity Commissioners, under the provisions of the Charitable Trusts Act, 1855,³ may be proved.

§ 1650*a*. Fourthly, it being by the Fines and Recoveries Act, 1888,⁴ required ⁵ that all disentailing deeds shall be inrolled in the Inrolment Department of the Central Office; proof of the inrolments of such deeds may be made in accordance with the general principles already indicated.⁶

§ 1651. Fifthly, similar observations apply to proof of the inrolment, in the same office, of an annuity deed.⁷

§ 1652. Judgments in order to bind land in England generally require what modern Acts term “Registration,” rather than “Inrolment.” By the Land Charges Act, 1900,⁸ it is provided that “a judgment or recognizance, whether obtained or entered into on behalf of the Crown or otherwise, and whether obtained or entered into before or after the commencement of this Act, shall not operate as a charge on land, or on any interest in land, or on the unpaid purchase-money for any land, unless or until a writ or order for the purpose of enforcing it is registered under section five of the Land Charges Registration and Searches Act, 1888.”⁹ When a judgment is against land in Ireland, if it was entered up previously to 15th July, 1850, it operates as a charge on the lands of the debtor, and is subsequently binding on him and all persons claiming under him, and the creditor has a similar charge to that which he would have had if the debtor, having power to so charge the land, had done it by writing under his hand;¹⁰ but the above provisions do not apply to lands purchased by a judgment debtor after 15th July, 1850; against which, by the Judgments Mortgage (Ireland) Act, 1850, a judgment creditor has the same rights as a

¹ See 12 & 13 V. c. 109, § 18, set out ante, § 1647, n., and also, § 17, set out ante, § 1647, n., making office copies evidence.

² See ante, § 1127.

³ 18 & 19 V. c. 87.

⁴ 3 & 4 W. 4, c. 74.

⁵ See ante, § 1122.

⁶ See supra, § 1647.

⁷ As to which, see ante, § 1125.

⁸ 63 & 64 V. c. 26, § 2, sub-a. 1.

⁹ 51 & 52 V. c. 51.

¹⁰ 5 & 6 W. 4, c. 55; 3 & 4 V. c. 105 (“The Debtors (Ireland) Act, 1840”).

§ 1652.

judgment creditor under a judgment obtained after the last-mentioned date.¹ And by the Judgments Mortgage (Ireland) Act, 1850, the judgment creditor, on a judgment obtained since 15th July, 1850, may, at any time after such judgment was obtained, file in the court in which it was obtained an affidavit of ownership of land by the debtor and may register the same in the office for registering deeds, conveyances, and wills, in Ireland, and such registration will operate to vest in the creditor all the estate and interest of the debtor in the lands mentioned in such affidavit, subject, however, to redemption on payment of the debt; and the creditor has all such rights, powers, and remedies, as if an effectual assurance to him had been made when the affidavit was registered.² In order that a purchaser of such lands may be affected, there must be a re-registration every five years.³ The sum of the matter consequently is, that, to affect Irish land by a judgment, there must be a chain of evidence consisting of three links. First, the judgment must be proved in the usual way; next, the affidavit, which has been filed in the court when the judgment was entered, must be proved by an office, or a certified, or an examined, copy; and, lastly, the due registration of an office copy of this affidavit in the office for registering deeds and wills in Ireland, must be proved either by an examined or by a certified copy.⁴ It seems, too, to be still a question of doubt⁵ whether such last-named copy will be received in evidence, unless a notice, such as is required by the Registry of Deeds (Ireland) Act, 1892,⁶ has been duly given.

¹ 13 & 14 V. c. 29, § 6.

² 13 & 14 V. c. 29, § 7 ("The Judgments Mortgage (Ireland) Act, 1850").

³ *Id.* § 4.

⁴ See *Duncan v. Brady*, 1860, 12 Ir. C. L. R. 171; 13 & 14 V. c. 72, § 9.

⁵ 2 & 3 W. 4, c. 87, § 32, which enacts as follows, "in all proceedings before any court of justice, for all purposes whatsoever, an office copy of any memorial registered in the said office shall, upon such office copy being proved in like manner as an office copy of any other record, be received and taken as evidence of the contents of the memorial of

which it purports to be an office copy, without the production of the original memorial: provided always, that the party producing such office copy shall, if out of Dublin ten days, and if in Dublin eight days, before producing the same, give notice in writing to the adverse party thereof; and provided also, that such adverse party shall not within four days after receiving such notice, demand by a counter notice that the original memorial shall be produced; and in every case in which such counter notice shall be given, the costs of producing the original memorial shall be paid by either party as the court in which the

§ 1652a. § 1652A. In the seventh place, there exist special provisions as to the mode of proof which may be given of the inrolment of deeds relating to lands in Yorkshire. The Yorkshire Registries Act, 1884,¹ which now authorises the *registration of deeds*, conveyances, wills, incumbrances, and other matters affecting lands in Yorkshire, provides that the registrar, or his deputy, shall indorse on each instrument registered a certificate stating the date of registration, and the volume, page, and number in the register in which it is inrolled; that this certificate shall then be signed by the registrar and sealed with the office seal; and that after this it shall be evidence,² and the signature and seal judicially noticed.³ The registrar must also, at the instance of any person, cause an official search to be made in the office books, and furnish a certificate of the result under his hand and the office seal; and every certificate so signed and sealed, shall be receivable in evidence.⁴ By the same Act, it is also provided⁵ that any person shall be authorised—subject to the provisions of the Act, and to any rules made thereunder—to require a certified copy of, or extract from, any document inrolled in the register, or of or from any entry in the register, or any book or index kept at the office, or any rule made under the Act, and such Act then proceeds to enact, that “thereupon a certified copy or extract, signed by the registrar and sealed with the seal of the register office, shall be given to such person; and every such copy or extract, so signed and sealed, shall be receivable as evidence of the contents of such document or entry, in every case where such contents may, under the rules of evidence, be proved by means of any copy or extract; but nothing in this section contained shall be taken to dispense with the production of any original document, in any case in which the production thereof might otherwise be required, nor to dispense with any proof, which might otherwise be required, as to the due making

proceeding shall take place, or the taxing officer of such court, may determine.”

¹ 47 & 48 V. c. 54, amended by 48 V. c. 4. The first-named Act repeals the old statutes relating to registration in Yorkshire, cited ante, § 1127, and establishes three register offices

—at Northallerton, Beverley, and Wakefield, § 31. As to inrolment of deeds relating to lands in Yorkshire, see ante, § 1127.

² § 9.

³ § 32.

⁴ §§ 20, 21.

⁵ § 22.

and execution thereof." By another section of the Act, all copies of inrolments of bargains and sales inrolled in the old registries, and of the entries or inrolments of deeds, wills, writings, or conveyances registered at full length in the old registry for the North Riding, shall be signed by the registrar and sealed with the seal of the office; and all copies so signed and sealed shall be as good evidence as attested copies under the old law.¹

§§ 1652a
—1652c.

§ 1652b. Eighthly, an Act of the reign of Queen Anne,² authorises the registration of every "deed, conveyance, will, or probate of the same" relating to lands in Middlesex. This Act has, however, been partially repealed by the Land Registry (Middlesex Deeds) Act, 1891.³ This latter Act contains⁴ enactments by which the registration and inrolment of deeds as to lands in Middlesex are now governed. Those as to certificates of inrolment,⁵ and of searches,⁶ are, generally speaking, the same as under the Yorkshire Registries Act, 1884; but these certificates need only be signed "by an officer of the registry," and—unlike those in Yorkshire—require no official seal. Certificates of searches are now directed,⁶ to be given by the registrar.⁷

§ 1652c. In the ninth place the Land Transfer Acts, 1875 and 1897,⁸ authorise, and in some cases render compulsory, the registration of title to land in England, and provide for the issue by the registrar of a land certificate to the first registered proprietor of freehold land, stating the title of the proprietor of the land therein,⁹ and for the issue to the first registered proprietor of leasehold land of an office copy of the registered lease,¹⁰ which copy has a statement indorsed thereon as to whether any declaration as to title of the lessor has been made, and as to any other particulars of the lease entered on the register. A certificate of a charge upon registered land may similarly be

¹ § 45. The old statutes, repealed by this Act, required the copies to be attested by "two credible witnesses." See ante, § 1645, ad fin.; also 5 A. c. 18, § 2; 6 A. c. 35, § 17; and 8 Geo. 2, c. 6, § 21.

² 7 A. c. 20, partly repealed by "the Land Registry (Middlesex Deeds) Act, 1891" (54 & 55 V. c. 64). See ante, § 1127.

³ 54 & 55 V. c. 64.

⁴ Id. Sched. I.

⁵ Sched. I. to 54 & 55 V. c. 64, r. 7.

⁶ Id. r. 11.

⁷ The registrar's signature does not require to be proved in any way. See 8 & 9 V. c. 113, "The Documentary Evidence Act, 1845," § 1, cited ante, § 7.

⁸ 38 & 39 V. c. 87, and 60 & 61 V. c. 65. Ante, § 1126A.

⁹ 38 & 39 V. c. 87, § 10.

¹⁰ Id. § 16.

§§ 1652c,
1653.

issued by the registrar to the proprietor of such charge.¹ Fresh certificates may be issued upon transfers of registered land or charges to the transferees.² These certificates and office copies must be produced to the registrar upon any subsequent entry being made on the register relating to the land, and an official indorsement is made on the certificate or office copy of any such registered transactions,³ and in the case of a sale the certificate or office copy is handed over to the purchaser on completion.⁴ New certificates and office copies may be obtained from the registrar when he is satisfied that the originals have been lost or destroyed.⁵ Land certificates and certificates of charge, issued as above mentioned, are *prima facie* evidence of the several matters therein contained, and the office copies of registered leases are evidence of the contents of the original leases.⁶ The Act of 1875 further provides⁷ that any instrument purporting to be sealed with the seal of a district registry shall be admissible in evidence, and if a copy, the same shall be admissible in like manner as the original. The effect of registration under these Acts has been referred to in an earlier part of this work.⁸

1653. Tenthly, to render a parson's deed of relinquishment available under the Clerical Disabilities Act, 1870,⁹ first, the deed must be inrolled in the Inrolment Department of the Central Office,¹⁰ and next, an office copy of it must be recorded by the bishop. The statute then provides¹¹ that "a copy of the record in the registry of the diocese, duly extracted and certified by the registrar of the bishop, shall be evidence of the due execution, inrolment, and recording of the deed, and of the fulfilment of all the requirements of the Act in relation thereto." The above section must be read in connection with the Documentary Evidence Act, 1845, and when this is done, the mode in which proof of the execution and inrolment of such a deed must be proved is plain.

¹ 38 & 39 V. c. 87, § 22.

² *Id.* §§ 29, 34, 40.

³ 60 & 61 V. c. 65, § 8, sub-s. 1.

⁴ *Id.* § 8, sub-s. 2.

⁵ *Id.*

⁶ 38 & 39 V. c. 87, § 80. As to certificates granted under the old Land Transfer Act of 1862, see

ante, § 1611, n.

⁷ *Id.* § 120.

⁸ *Ante*, § 1126A.

⁹ 33 & 34 V. c. 91; cited *ante*, § 1119.

¹⁰ R. S. C. 1883, Ord. LXI. rr. 1, 9.

¹¹ § 7.

§ 1653A. The inrolment of articles of clerkship, which we have seen¹ is required to be made in the Inrolment Department of the Central Office, may be proved in the manner pointed out in a previous paragraph as to the proof of documents inrolled in that office, or in the old Petty Bag Office.²

§§ 1653a,
1655.

§ 1654. In the twelfth, and last, place, there are various provisions in force under which bills of sale, warrants of attorney, and cognovits are required to be inrolled. As regards bills of sale, under the Bills of Sale Act, 1878 and 1882,³ the certificate of registration of a bill of sale in the Bills of Sale Department of the Central Office,⁴ even though it state that the affidavit of execution has been duly filed, as required by those statutes, is not sufficient evidence of the bill of sale; but an authenticated or office copy of the document registered, must, in strict law, be actually produced.⁵ Warrants of attorney, cognovits, and judge's orders being inrolled in the Bills of Sale Department of the Central Office, proof of such inrolment may be given in the usual way,⁶ and copies of the documents may be given in evidence, under the Documentary Evidence Act, 1845.⁷

§ 1654A. There are many cases in which it is necessary to give proof of *Bye-laws*. In two of these, which are of frequent occurrence, the bye-laws may be proved by the production of certified copies thereof.

§ 1655. In the first of these cases the Companies Clauses Consolidation Act, 1845,⁸ empowers every company to which that Act applies, to make bye-laws for the purpose of regulating the conduct of their officers and servants, and of providing for the due management of their affairs;⁹ and enacts that the production of a written or printed copy *purporting* to have the *seal of the company affixed* thereto, "shall be sufficient evidence of such bye-laws in all cases of prosecution under the same."¹⁰

¹ See ante, § 1126.

² See supra, § 1647.

³ 41 & 42 V. c. 31, § 10; 45 & 46 V. c. 43, § 8.

⁴ R. S. C. 1883, Ord. LXI. r. 1.

⁵ See *Halkett v. Emmott*, 1878, 3 Q. B. D. 555; *Mason v. Wood*, 1875, 1 C. P. D. 63.

⁶ See supra, § 1647.

⁷ See ante, §§ 7, 8.

⁸ 8 & 9 V. c. 16.

⁹ Id. §§ 124—6.

¹⁰ Id. § 127. See, also, Id. § 1, cited ante, § 7; and query whether the same proof would suffice if the company offered the bye-laws in evidence in defending an action for false imprisonment.

**§§ 1656,
1657-8.**

§ 1656. The second of such cases is where proof of the bye-laws of a railway company is required in a court of law. A railway company have power to make bye-laws for regulating the travelling upon or using and working their railway, by which penalties may be imposed upon persons other than the railway company's servants. Before such bye-laws can be enforced, however, the company must produce either the book containing the original bye-laws purporting to be under its seal, or an examined or certified copy of such bye-laws;¹ it must also probably (although this is not altogether clear) show that a certified copy of such bye-laws has, in cases where they were made between the 9th of November, 1846,² and the 10th October, 1851,³ been sent to the old Commissioners of Railways, and in other cases to the Board of Trade, and that such bye-laws have not been disallowed;⁴ and it further must prove such bye-laws to have been duly published.⁵ Due publication is, at least on the hearing of an information before justices charging a railway passenger with a violation of railway bye-laws, sufficiently proved by showing that copies of such bye-laws were affixed at each of the two stations at which the defendant entered and left a train.⁶ The present law does not require any further proof.⁷

§§ 1657-8. The mode of proof of bye-laws in other cases, however, varies, according to the language of the particular statute or charter under the authority of which the bye-laws have been made.⁸

¹ *Motteram v. Eastern Counties Rail. Co.*, 1859, 29 L. J. M. C. 57.

² See 9 & 10 V. c. 105, § 2; and *Gazette*, 6th Nov. 1846.

³ The date when the Act appointing Commissioners of Railways was repealed, viz., 14 & 15 V. c. 64, § 1.

⁴ Compare 3 & 4 V. c. 97, §§ 7-9; and 8 & 9 V. c. 20, §§ 108-11. As to proof of order by old Commissioners of Railways, allowing the bye-laws, see ante, note to §§ 1596-7, title "*Railway Documents*;" and as to proof of similar order by Board of Trade, see id.; and see also § 1527.

⁵ *Motteram v. Eastern Counties Rail. Co.*, 1859, 29 L. J. M. C. 57.

⁶ *Motteram v. Eastern Counties Rail. Co.*, 1859, 29 L. J. M. C. 57 (diss. Williams, J.).

⁷ By § 10 of 3 & 4 V. c. 97 ("The Railway Regulation Act, 1840"). "so much of every clause, provision, and enactment in any Act of Parliament heretofore passed as may require the approval or concurrence of any justice of the peace, court of quarter sessions, or other person or persons, other than members of the said companies to give validity to any bye-laws, orders, rules, or regulations made by any such [i.e., railway] company shall be repealed."

⁸ Stated in alphabetical order, the

§§ 1657-8.

following examples may be usefully instanced:—“*The Commissioners Clauses Act, 1847*” (10 & 11 V. c. 16), contains, in §§ 96–98, provisions as to the making and proof of bye-laws under that Act. “*The Common Lodging Houses (Ireland) Acts*” (29 & 30 V. c. 44, §§ 21, 23, Ir.; 35 & 36 V. c. 69, §§ 2, 5, Ir.) enable bye-laws made thereunder to be proved by copies signed or sealed by the proper local authority, and countersigned by some person or persons duly representing the local government, which would seem to be either the under-secretary to the lord lieutenant or the president or vice-president of the board, or any two other members of the board, “both executing.” See 35 & 36 V. c. 69, § 4, Ir. As to bye-laws of English common lodging houses: see *infra*, sub tit. “Public Health Act.” *Dublin Corporation* bye-laws may, under 12 & 13 V. c. 97, § 20, Ir., be proved by a copy under the corporate seal, provided it contain a declaration signed by the lord mayor that the bye-law has been duly made, published, and allowed, and is still in force. “*The Explosives Act, 1875*” (38 & 39 V. c. 17), though it contains in §§ 34–38, and 84, several elaborate provisions for the making and publication of bye-laws with respect to the loading and conveyance of gunpowder, has no clause to regulate or simplify the mode of proving the same. “*The Harbours, Docks, and Piers Clauses Act, 1847*” (10 & 11 V. c. 27), also provides for the making and proof of bye-laws. See §§ 83–90. *London Corporation* bye-laws, made in pursuance of 10 G. 4, c. cxxiv.; 1 & 2 W. 4, c. lxxvi.; 1 & 2 V. c. ci.; and 8 & 9 V. c. 101, for regulating the port of London, and the vending and delivery of coals, may, under §§ 6 and 7 of the last-mentioned Act, and 8 & 9 V. c. 113 (“*The Documentary Evidence Act, 1845*”), § 1 (cited *ante*, § 7), be proved by the production of a printed or written copy purporting to be signed by the town clerk of the city of London; and such copy “shall, without any other proof, be admitted as evidence of such bye-laws, and of the making, submission, allowance, and publica-

tion thereof, unless the contrary shall be proved.” “*The Markets and Fairs Clauses Act, 1847*” (10 & 11 V. c. 14), §§ 42–49, also contains provisions respecting the making and proof of bye-laws. “*The Merchant Shipping Act, 1894*” (57 & 58 V. c. 60), § 362, enables harbour authorities, with the approval of a secretary of state, to make bye-laws for regulating the embarkation and landing of emigrants, and for licensing emigrant porters; but, unlike the repealed “*Passengers Act, 1855*” (18 & 19 V. c. 119, § 82), contains no provisions for proving such bye-laws. “*The Metropolis Local Management Act, 1855*” (18 & 19 V. c. 120), by § 203, provides that the production of a printed copy of the bye-laws made by the Metropolitan Board of Works (whose powers and duties are now vested in the London County Council by 51 & 52 V. c. 41, § 40), or by a district board or vestry, under that Act, “if authenticated by the seal of the board or vestry, shall be evidence of the existence, and of the due making, confirmation, and publication of such bye-laws, in all prosecutions under the same, without adducing proof of such seal, or of the fact of such confirmation or publication of such bye-laws.” *Mines*.—Under “*The Coal Mines Regulation Act, 1872*” (35 & 36 V. c. 76), § 59, and “*The Metalliferous Mines Regulation Act, 1872*” (35 & 36 V. c. 77), § 30, the special rules which are established in any mine under either of those Acts may be proved by a copy certified under the hand of one of the government inspectors; and such copy is also evidence that the rules have been duly established. See, also, 27 & 28 V. c. 48, § 5. Under “*The Municipal Corporations Act, 1882*” (45 & 46 V. c. 50), § 24, the production of a written copy of a bye-law, made by the council under that Act, or under any former or present or future general or local Act of Parliament, if authenticated by the corporate seal, shall until the contrary is proved, be sufficient evidence of the due making and existence of the bye-law, and, if it is so stated in the copy, of the bye-law having been approved and confirmed

§§ 1657-8.

by the authority whose approval or confirmation is required to the making, or before the enforcing, of the bye-law. As to pleading such bye-laws, see *Elwood v. Bullock*, 1844, 13 L. J. Q. B. 330. See, also, "*The Irish Municipal Corporation Act, 1840*" (3 & 4 V. c. 108), §§ 125—127. "*The Public Health Act, 1875*" (38 & 39 V. c. 55), §§ 182—188, provides that bye-laws made under that Act by any local authority other than the council of a borough,—whether they relate to scavenging and cleansing (§ 44), or to the keeping of animals (§ 44), or to common lodging-houses (§§ 80, 90), or to offensive trades (§ 113), or to mortuaries (§ 141), or to new buildings (§ 157), or to public pleasure grounds (§ 164), or to markets (§ 167), or to slaughter-houses (§ 169), or to the licensing of horses, boats, &c., for hire (§ 172), or to hop pickers (§ 314),—may be proved by copies signed and certified by the clerk of such authority to be true copies, and to have been duly confirmed; and every such copy is to be evidence until the contrary is proved in all legal proceedings of the due making, confirmation (as to which see 47 V. c. 12), and existence of such bye-laws without further or other proof; and, by § 326, all bye-laws made under any of the Sanitary Acts, not inconsistent with this Act, "shall be deemed to be bye-laws under this Act." "*The Public Health (Ireland) Act, 1878*" (41 & 42 V. c. 52, Ir.), § 223, adopts the same mode of proof with respect to all bye-laws made by any sanitary authority under that statute. See, also, §§ 41, 54, 91, 100, 103, 105, 129, of same Act. "*The Public Parks (Scotland) Act, 1878*" (41 V. c. 8), § 20, also adopts that mode of proof with respect to bye-laws made under it by any local authority. "*The Salmon Fisheries Act, 1873*" (36 & 37 V. c. 71), contains, in § 45, provisions for facilitating the proof of bye-laws made by any board of conservators for a fishery district. "*The Slaughter Houses, &c. (Metropolis) Act, 1874*" (37 & 38 V. c. 67), § 8, enables any bye-law or order made by a local authority under the Act to be proved

by a printed copy, purporting to be certified by the clerk of the local authority to be a true copy, or purporting to be sealed by the seal of the local authority; and any such bye-law or order shall, until the contrary is proved, be deemed to have been duly made and confirmed. *Thames Conservancy bye-laws*, made by the conservators since the commencement of the year 1865, are, by 27 & 28 V. c. 113, § 33, provable by copies purporting to be printed by direction of the conservators, and authenticated by the common seal and by the signature of their secretary; and every such copy is conclusive evidence of such bye-law, and of the due making and allowance thereof, without proof of such seal or signature. "*The Towns Improvement Clauses Act, 1847*" (10 & 11 V. c. 34), §§ 200—207, and "*The Town Police Clauses Act, 1847*" (Id. c. 89), § 71, also contain provisions as to the making and proof of bye-laws. Under "*The Metropolis Water Act, 1871*" (34 & 35 V. c. 113), § 25, a printed copy of the regulations made by any metropolitan water company, for the purpose of preventing the waste, misuse, or contamination of water, if dated, and purporting to be made as in that Act is pointed out, and to be authenticated by the seal of such company, is "conclusive evidence of the existence, and of the due making, confirmation, and publication of such regulations in all prosecutions or proceedings under the same, without adducing proof of such seals, or of the fact of such confirmation or publication of such regulations, or of any of the requirements of the Act relative thereto having been complied with. By "*The Metropolis Water Act, 1902*" (2 Edw. 7, c. 41), the undertakings of the metropolitan water companies are transferred to the metropolitan water board, in whom, by § 3, are vested all the rights, powers, authorities and privileges of the various companies; and by § 46, all bye-laws, rules and regulations made by the various companies continue in force with respect to the undertakings to which they relate until repealed, altered, or superseded.

§ 1659. In some cases the validity of bye-laws may, as we have seen, be inferred from long usage.¹

§§ 1659,
1660.

§ 1660.² The admissibility and effect of public documents, as instruments of evidence, must next be considered. *Statutes, State papers*, and other writings of a cognate character, will generally be admissible, either as *prima facie* or as conclusive proof of the facts directly stated in them, if duly authenticated in some one of the modes before stated, and if their contents be pertinent to the issue. In many cases they will even be received as *prima facie* evidence of matters stated in them by way of introductory *recital*. Thus, where certain *public statutes* recited that great outrages had been committed in a particular part of the country, and a public *proclamation* was issued, with similar recitals, and offering a reward for the discovery and conviction of the perpetrators, these recitals were held admissible and sufficient evidence of the existence of those outrages, to support the averments to that effect in an information for a libel on the Government in relation thereto;³ and a recital of a state of war, in the preamble of a public statute, is good evidence of its existence, and the war will be taken notice of without further proof, whether this nation be or be not a party to it.⁴ But even the recitals in a public Act are not conclusive evidence. Therefore, where the Schedule of the Municipal Corporation Act described a place as an existing borough, proof was admitted to show that this description was false.⁵ Formerly a recital used never to be inserted in a private Act, unless its truth has first been ascertained by the judges, to whom the bill had been referred.⁶ And consequently when this was the practice, a recital of relationship, even in a *private* Act, was received as cogent evidence of pedigree. The evidence in support of private bills is, however, no longer submitted to the judges for approval, and, therefore, recitals inserted in them since this change in the practice appear to be now inadmissible.⁷ And, as a general

¹ See ante, § 128.

² Gr. Ev. § 491, in some part.

³ R. v. Sutton, 1816, 4 M. & Selw. 532.

⁴ R. v. De Berenger, 1814, 3 M. & Selw. 67.

⁵ R. v. Greene, 1837, 6 A. & E. 548.

⁶ Wharton Peer., 1845, 12 CL & Fin. 302 (H. L.); Shrewsbury Peer., 1857, 7 H. L. C. 13.

⁷ Shrewsbury Peer., 1857, 7 H. L. C. 13 (Ld. St. Leonards).

§§ 1660— rule, a local or private statute, though it contains a clause
1662. requiring it to be judicially noticed, is not, as against *strangers*, any evidence of the facts recited;¹ neither does it affect the public with a knowledge of its contents.²

§ 1661.³ The *Speech of the Sovereign* in opening Parliament, and the Address of either House to the Crown, would seem to be evidence, in the nature of reputation, of the public matters they recite.⁴ The *Journals*, also, of either House are the proper evidence of the action of that House upon all matters before it, whether legislative, ministerial, or in the Lords' House, judicial.⁵ Accordingly, a Lords' Committee of Privileges has even admitted an entry in their Journals as evidence of the limitations in a patent of peerage, without requiring the production of the patent;⁶ a foreign declaration of war, transmitted by the British Ambassador to the Secretary of State's office, and produced by a clerk from that office, is sufficient evidence to prove the date of the commencement of hostilities between two foreign states.⁷ How far *diplomatic correspondence* establishes the facts recited, does not in England clearly appear.⁸ In America, such correspondence, communicated by the President to Congress, is sufficient proof of the acts of foreign governments and functionaries therein narrated:⁹ and would seem to be there generally admissible, whenever the facts recited are not the principal points in issue, but are required to be proved merely in order to support some introductory averment in the pleadings.¹⁰

§ 1662. The Government Gazette is, as already pointed out, at

Brett v. Beales, 1829, M. & M. 421; Taylor v. Parry, 1840, 1 M. & Gr. 604; D. of Beaufort v. Smith, 1849, 19 L. J. Ex. 97; Cowell v. Chambers, 1856, 21 Beav. 619; Mills v. May, of Colchester, 1867, L. R. 2 C. P. 476; Polini v. Gray, and Sturla v. Freccia, 1879, 12 Ch. D. 411 (C. A.).

² Ballard v. Way, 1836, 5 L. J. Ex. 207.

³ Gr. Ev., § 491, slightly.

⁴ R. v. Francklin, 1731, 17 How. St. Tr. 636.

⁵ Jones v. Randall, 1774, 1 Cowp.

17; Root v. King, 1827, 7 Cowen, 613 (Am.).

⁶ *Id.* Dufferin's case, 1837, 4 Cl. & Fin. 568 (H. L.); Saye and Sele Peer., 1848, 1 H. L. C. 507.

⁷ Thelluson v. Cosling, 1803, 4 Esp. 266.

⁸ See R. v. Francklin, 1731, 17 How. St. Tr. 638.

⁹ Radcliffe v. Un. Ins. Co., 1810, 7 Johns. 38 (Am.); Talbot v. Seeman, 1801, 1 Cranch, 1, 37.

¹⁰ Radcliffe v. Un. Ins. Co. (Am.), supra (Kent, C.J.).

common law evidence of various acts of state, such as addresses received by the Crown, and the like.¹ But in regard to the acts of public functionaries, which have no relation, or only a slight relation, to the affairs of government,—such as the appointment of an officer to a commission in the army,² or the Sovereign's grant of land to a subject,³—the Gazette, unless rendered admissible by statute, cannot in general be read in evidence. Nevertheless, the Gazette is, by the Documentary Evidence Act, 1868,⁴ as already pointed out,⁵ *prima facie* evidence of any proclamation, order, or regulation issued by the Sovereign, or by the Privy Council, or by any of the principal departments of the government.⁶

§ 1663. In one instance, at least, the Government Gazette has been made by statute “*sufficient proof*” of certain facts which are directed to be published in it.⁷

§§ 1663A–4. In some other cases the Gazette is, by statute, made conclusive evidence. The most important of such cases are enumerated in alphabetical order in the footnote.⁸

¹ *R. v. Holt*, 1793, 5 T. R. 436, 443; *Att.-Gen. v. Theakstone*, 1820, 8 Price, 89; *Picton's case*, 1806, 30 How. St. Tr. 493; *Van Omeron v. Dowick*, 1809, 2 Camp. 44; ante, § 15.

² *R. v. Gardner*, 1810, 2 Camp. 513; *Kirwan v. Cockburn*, 1805, 6 Esp. 233. But see now, by statute, ante, § 1638A.

³ *R. v. Holt*, 1793, 5 T. R. 443 (*Ld. Kenyon*).

⁴ 31 & 32 V. c. 37, § 5.

⁵ Ante, § 1527.

⁶ 31 & 32 V. c. 37, § 2.

⁷ See 29 & 30 V. c. 117, § 33; and 31 & 32 V. c. 59, § 29, *Ir.*, cited ante, § 1611, n., title “*Reformatory Schools Act*.”

⁸ Thus, as regards *Bank notes*, it is provided by the statutes 7 & 8 V. c. 32, § 15, and 8 & 9 V. c. 37, § 10, *Ir.*, which respectively regulate the issue of bank notes in England and Ireland, and require the Commissioners of Stamps and Taxes to publish in the London and Dublin Gazettes respectively certificates containing certain particulars, that the Gazette in which such publication shall be made shall be conclusive evidence in all courts of the amount

of bank notes which the banker named in the certificate is by law authorised to issue and have in circulation; the Irish Act adding, “exclusive of an amount equal to the monthly average amount of the gold and silver coin held by such banker as herein provided.” *Bankruptcy proceedings* may, as already stated (ante, § 1549), be also conclusively proved by production of the copy of the Gazette in which they were published. Under “*The City of London Parochial Charities Act*, 1883” (46 & 47 V. c. 36, § 36), an Order in Council approving a scheme for the management of charity property, and duly gazetted, is conclusive that the scheme was one within the Act, and neither such scheme nor the order can be further questioned in any legal proceeding. Under “*The Extradition Act*, 1870” (see 33 & 34 V. c. 52), § 5, an Order in Council, on being published in the London Gazette, is made “conclusive evidence that the arrangement therein referred to complies with the requisitions of the Act, and that the Act applies in the case of the foreign state mentioned in the order.” Again.

§ 1665.

§ 1665. Gazettes, even when they are not conclusive evidence, are, in common with all other *newspapers*, frequently offered in evidence with the view of fixing an adversary with *knowledge* of certain facts advertised therein; but here it is always advisable, and sometimes necessary,—unless the case is governed by a special Act of Parliament,—to furnish *some* evidence, from which the jury may infer that the party sought to be affected by the notice has read it. This doctrine applies even to cases where the notice published in the Gazette relates to some public matter, as, for instance, the blockade of a foreign port; for, although, as between nation and nation, the notification of a blockade may, from the moment it is made by one state to the government of another, bind all the subjects of the latter,¹ this rule will not extend to suits between private individuals. Therefore, where, in an action on a ship policy, the underwriters urged in defence, that the voyage was to a port which the master knew was blockaded, and that consequently the policy was void, the jury were held justified in negating any knowledge on the part of the master, though it was proved that he was in this country some time after the publication of the Gazette in which the blockade was notified.²

similar provisions are contained in several statutes with regard to Ireland. Thus, by "*The County Boundaries (Ireland) Act, 1872*" (35 & 36 V. c. 48), § 3, the Dublin Gazette is conclusive evidence of any order published in it, which purports to have been made by the Lord Lieutenant in Council under the provisions of the Irish County Boundaries Acts. Under "*The General Prisons (Ireland) Act, 1877*" (40 & 41 V. c. 49), § 57, Ir.), all rules and special rules as to prisons (which are proved in England as shown ante, §§ 1527, 1595, and 1596-7, and notes, titles "Public Prisons,") may be conclusively proved by the production of a Dublin Gazette in which they have been published. Under "*The Lands Drainage (Ireland) Acts of 1842, 1846, and 1847,*" respectively (being 5 & 6 V. c. 89, Ir.; 9 & 10 V. c. 4, Ir.; 10 & 11 V. c. 79, Ir.), by the last-mentioned Act (§ 4), final notices under such Acts may be conclusively proved by the production of the

Dublin Gazette in which they are published. And under "*The Peace Preservation Acts*" for Ireland (19 & 20 V. c. 36, Ir.; 28 & 29 V. c. 118, Ir.; 38 V. c. 14, Ir.), the production of the Dublin Gazette, "purporting to be printed and published by the King's authority," and containing any proclamation, warrant, order, or notice under "The Irish Peace Preservation Acts," is made (by 28 & 29 V. c. 113, § 2; 34 & 35 V. c. 25, § 5; and see, also, "The Criminal Law and Procedure (Ireland) Act, 1887" (50 & 51 V. c. 20, especially § 12, sub-s. 3)) conclusive evidence of all the facts and circumstances necessary to authorise the issuing of any such instrument; and every such instrument shall be deemed in all courts to have been issued in conformity with such Act.

¹ *The Neptunus*, 1799, 2 C. Rob. 110; *The Adelaide*, 1799, 2 C. Rob. 112, n.

² *Harratt v. Wise*, 1829, 9 B. & C. 712.

§ 1666. A Gazette containing a *notice of dissolution of partnership* will, however, be admissible without any additional proof, as sufficient evidence that they were aware of it, against all persons who have had no previous dealings with the firm.¹ It will be admissible evidence to show that the partnership has been openly dissolved, even against persons who have had previous dealings with the firm, after formal proof of the actual dissolution, by producing the deed.² But to deprive the old correspondents of a firm of their right of action against a retiring partner, further evidence must be given than the mere production of the Gazette in which notice of dissolution has been inserted;³ and if the defendant be not in a condition to prove that a circular was sent in due course to the plaintiff, he must at least show facts, from which an inference may be drawn that the plaintiff has seen the notice. This may be done in a variety of ways, as by proving that the plaintiff has been in the habit of taking in the Gazette or other newspaper, or has attended a reading-room where it was taken in, or has shown himself acquainted with other articles in the number containing the notice, or has evinced an unusual interest in the affairs of the partnership, and the like.⁴ It seems not to be enough to prove that the newspaper was circulated in the immediate neighbourhood of the plaintiff's residence.⁵

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1667.

§ 1667. The *admissibility and effect of judicial records* and documents must be considered in connexion with this subject. The general principle is that the mere *existence of a judgment, its date, and its legal consequences* are conclusively proved, as against all the world, by the production of the record, or the proof of an examined copy, for a judgment being a public transaction of a solemn character; must be presumed to be faithfully recorded,

¹ Godfrey v. Turnbull, 1795, 1 Esp. 371; Newsome v. Coles, 1811, 2 Camp. 617; Wright v. Pulham, 1816, 2 Chitty, R. 121; Hart v. Alexander, 1837, 7 C. & P. 749; and see "The Partnership Act, 1890" (53 & 54 V. c. 39), § 36, (2).

² Hart v. Alexander, 1837, 7 C. & P. 749.

³ Graham v. Hope, 1793, Peake, R. 154.

⁴ Godfrey v. Macauley, 1795, Peake, R. 155, n.; Jenkins v. Blizard, 1816,

1 Stark. R. 419; Hart v. Alexander, 1837, 7 C. & P. 749; Leeson v. Holt, 1816, 1 Stark. R. 186. As to notices by carriers restricting their liability, see 11 G. 4 & 1 W. 4, c. 68 ("The Carriers Act, 1830"); Munn v. Baker, 1817, 2 Stark. R. 255; Rowley v. Horne, 1825, 3 Bing. 2. As to notices given by railway or canal companies in the Gazette, see 17 & 18 V. c. 31, § 7.

⁵ Norwich and Lowestoft Navig. Co. v. Theobald, 1828, M. & M. 153.

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1668.

but that it furnishes no proof whatever of *collateral* facts, even though as between the parties to such judgment themselves such facts must have been proved. On these principles, in an action for malicious prosecution, the record is only conclusive to establish the fact of acquittal;¹ a judgment against a master or principal for the negligence of his servant or agent, is, as against the servant or agent, nothing more than conclusive evidence of the fact, that the master or principal has been compelled to pay the amount of damages awarded;² and a judgment recovered against a surety will not be evidence on his behalf to show anything more than the amount which he has been compelled to pay for the principal debtor.³ Similar principles are applicable to other cases where the party has a remedy over, as for contribution, or the like.⁴ Thus, in an action against a surety, who set up the defence that the plaintiff had received certain moneys from the principal in satisfaction of his damages, on a traverse of this defence, the plaintiff was allowed to put in evidence a judgment recovered back from the plaintiff by the assignees of the principal for the very moneys which he was said to have received in satisfaction, as being money had to their use, not indeed as being conclusive against the surety, but as being explanatory of the whole transaction.⁵

§ 1668. Judgments *inter alios* are admissible as evidence where the *record is matter of inducement*, or merely introductory to other evidence. Thus, where it is proposed to discredit a witness, by proving that he gave different testimony on a former trial, the judgment in the former cause will (notwithstanding

¹ *Ieggatt v. Tollervey*, 1811, 14 East, 302. It is no evidence whatever that the defendant was the prosecutor—even though his name appear on the back of the bill (3 B. N. P. 14)—nor of either his malice, or the absence of reasonable and probable cause (*Purcell v. Macnamara*, 1808, 1 Camp. 200; *Incedon v. Berry*, 1805, 1 Camp. 203, n., nor does the verdict preclude defendant from proving that plaintiff was in truth guilty. (See B. N. P. 15.)

² *Green v. New River Co.*, 1792, 4 T. R. 590; *Pritchard v. Hitchcock*, 1843, 12 L. J. C. P. 322; *Tyler v.*

Ulmer, 1815, 12 Mass. 166 (Am.). But it is *not* evidence of the servant's misconduct. See *id.*

³ *King v. Norman*, 1847, 17 L. J. C. P. 23. And it furnishes no proof that plaintiff was legally liable to pay that amount owing to the principal's default. *Id.*

⁴ *Powell v. Layton*, 1806, 2 Bos. & P. 371; *Kip v. Brigham*, 1810, 6 Johns. 158; 7 Johns. 168 (Am.); *Griffin v. Brown*, 1824, 2 Pick. 304 (Am.).

⁵ *Pritchard v. Hitchcock*, 1843, 6 M. & Gr. 151.

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that the parties to it were strangers to the subsequent suit) be admissible for the purpose of *laying the foundation* for the evidence of the former statements.¹ Accordingly, upon an indictment for perjury committed on a trial of an action in the High Court, the production by the officer of the filed copy of the writ² and of the pleadings³ will sufficiently prove the existence of the action; ⁴ if a party be indicted for aiding the escape of a felon from prison, the production of the record of conviction from the proper custody, will be conclusive evidence that the prisoner was convicted of the crime stated therein; ⁵ on an ejectment by an heir-at-law, who, to establish his legitimacy, had called his mother to prove her marriage before his birth, a statement by her on cross-examination, that she had never been before certain magistrates to affiliate her son, was allowed to be contradicted by the production of a bastardy order, which purported to have been made on her complaint in regard to the plaintiff by the magistrates in question; ⁶ in an action against a sheriff⁷ for neglect in regard to an execution, it was usual to give in evidence judgments against third persons, to show the character in which the plaintiff claimed, and the amount of damage he had sustained; ⁸ if A. sue the sheriff for trespass to his goods, the latter may give in evidence a judgment against B., and show that he seized the goods by virtue of a fieri facias upon that judgment, and that the goods belonged to B.; ⁹ a record,¹⁰ where it constitutes one of the muniments of a party's title to land or goods,—as where a deed was made under a decree in Chancery,¹¹ or where goods were purchased at a sale made by a sheriff upon an execution,¹²—may be given in evidence against a party

¹ *Clarges v. Sherwin*, 1698-9, 12 Mod. 343; *Foster v. Shaw*, 1821, 7 Serg. & R. 163 (Am.).

² Filed under R. S. C. Ord. V. r. 7.

³ Filed under R. S. C. Ord. XLI. r. 1.

⁴ *R. v. Scott*, 1877, 2 Q. B. D. 415.

⁵ *R. v. Shaw*, 1823, R. & R. 526. A certificate of the conviction would also be evidence. See ante, §§ 1612—1614.

⁶ *Watson v. Little*, 1860, 29 L. J.

Ex. 267.

⁷ A sheriff is no longer liable to an action for an escape: 50 & 51 V. c. 55, § 16; 40 & 41 V. c. 49, § 43, Ir.

⁸ *Davies v. Lowndes*, 1835, 1 Bing. N. C. 607; *Adams v. Balch*, 1827, 5 Greenl. 188 (Am.).

⁹ 1 St. Ev. 255.

¹⁰ Gr. Ev. § 539, as to three lines.

¹¹ *Barr v. Gratz*, 1819, 4 Wheat. 213 (Am.).

¹² 1 St. Ev. 255; *Witmer v. Schlatter*, 1830, 2 Rawle, 359 (Am.);

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1669.**

who is a stranger to it; and, in an action to recover lands, a decree in a suit between the defendant's father, and other persons unconnected with the plaintiff, which directed that defendant's father should be let into possession of the estate as his own property, is admissible, not indeed, as proof of any of the facts therein stated, but to explain in what character the father, through whom defendant claimed, had taken possession of the estate.¹ Many other instances of the same principle might be given.

§ 1669. Adjudications are sometimes tendered in evidence for the purpose of *protecting* the magistrates who pronounced them, and the officers who enforced them, against an action of trespass. Here the rule of law is, that if the adjudication, when read in connexion with the other proceedings, shows, either expressly or by fair and necessary inference, that a judicial authority pronouncing it had jurisdiction over the subject-matter, it will furnish conclusive evidence of the truth of the facts stated in it, even if those facts are necessary to give such authority jurisdiction; ² or, perhaps, the doctrine may be more correctly stated as being that the production of the judgment, and of the proceedings on which it is founded, will be a bar to all inquiry respecting the truth or falsehood of those facts on the question which must have been in controversy before the adjudicating tribunal which are stated in it, and will conclusively establish the immunity of every person who has acted judicially with regard to such matters.³ This doctrine is essential to the administration of the law,—since, without it, who would be found so bold as to act as a magistrate? It is even occasionally prayed in aid for the protection of judges of courts of record; for although by an excellent law of very great antiquity, no action will lie against such personages for an erroneous judgment, or for any other act done by them in the exercise of their judicial functions, and

Jackson v. Wood, 1829, 3 Wend. 27, 34 (Am.); Fowler v. Savage, 1819, 3 Conn. 90, 96 (Am.).

¹ Davies v. Lowndes, 1843, 12 L. J. C. P. 506.

² See and compare Taylor v. Clemson, 1844, 2 Q. B. 1031 (Tindal, C.J., delivering the judgment of Ex. Ch.);

Basten v. Carew, 1825, 3 B. & C. 652 (Ld. Tenterden); Brittain v. Kinnaird, 1819, 4 Moore, C. P. 50; Betts v. Bagley, 1832, 12 Pick. 572, 582 (Am.).

³ Aldridge v. Haines, 1831, 2 B. & Ad. 408; 1 St. Ev. 255.

within the general scope of their jurisdiction,¹ the protection thus given does not extend to cases where a judge, either wilfully, or under a mistake not of fact but of law, acts wholly without jurisdiction.² But such doctrine is best illustrated by, and is usually applied to, cases in which justices of the peace are sued by parties who imagine themselves wronged by a conviction or order.

§ 1670. A leading authority³ on this subject was an action of trespass against magistrates for taking and detaining a vessel which had been seized by them, as magistrates, under the now repealed Bumboat Act,⁴ in which the plaintiff sought to prove that such vessel was not a boat within the meaning of the Act, but was not permitted to do it, on the ground that the conviction was the only evidence of what the magistrates had determined and such conviction having been put in and calling the vessel a boat was held to constitute a conclusive defence to the action. On a motion for a new trial, it was asked whether a justice could seize a seventy-four gun vessel, and then justify the legal detention by describing it in the conviction as a boat, to which the court answered that even supposing such a thing done, the conviction would still be conclusive, and the party would be without civil remedy, though so gross a decision would undoubtedly be good ground for a criminal proceeding against the justice;⁵ Richardson, J., observing, "whether the vessel in question were a boat or not, was a fact on which the magistrate was to decide, and the fallacy is in assuming that the fact which the magistrate has to decide is that which constitutes his jurisdiction. If a fact decided, as this has been, might be questioned in a civil suit, the magistrate would never be safe in his jurisdiction."⁶

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1670.

¹ *Garnett v. Ferrand*, 1827, 6 B. & C. 611, 625; *Floyd v. Barker*, 1607, 12 Co. Rep. 25; *Fray v. Blackburn*, 1863, 3 B. & S. 576; *Scott v. Stansfield*, 1868, L. R. 3 Ex. 220.

² *Anderson v. Gorrie*, 1894, 71 L. T. 382 (C. A.); *Houlden v. Smith*, 1850, 19 L. J. Q. B. 170. *Calder v. Halket*, 1839, 3 Moo. P. C. C. 28.

³ *Brittain v. Kinnaird*, 1819, 4 Moore, C. P. 50. In *Mould v. Williams*, 1844, 5 Q. B. 473, Coleridge, J., observed, "*Brittain v.*

Kinnaird has been oftener recognised than almost any modern case." See *Ayrton v. Abbott*, 1849, 18 L. J. Q. B. 314.

⁴ 2 G. 3, c. 28; repealed by 2 & 3 V. c. 47 ("The Metropolitan Police Act, 1839"), § 24.

⁵ 1 B. & B. 438, 439; cited with approbation by Coleridge, J., in *R. v. Buckinghamshire JJ.*, 1843, 12 L. J. M. C. 29.

⁶ 1 B. & B. 442, cited by Id. Denman as an admirable judgment in *R. v. Bolton*, 1841, 1 Q. B. 74.

**§§ 1671,
1672.**

§ 1671. Further examples of the doctrine stated¹ and illustrated in the preceding paragraphs are that where a justice, acting under the Highway Act, 1835,² issued an order for the removal of certain timber encumbering the highway, in an action for trespass brought against him by the owner of the timber, the plaintiff was not allowed to prove, in contradiction to the order, that the place where the wood was lying was no part of the highway;³ and also that where two magistrates were sued in trespass for having given the plaintiff's landlord possession of a farm as a deserted farm, under statutory powers, the production of the record of their proceedings setting forth the facts necessary to give them jurisdiction, was held conclusive, and the plaintiff was not permitted to prove that the farm was in fact not deserted.⁴ Many other cases support the general proposition, that where (supposing the facts alleged to be true) a magistrate or other judicial personage has jurisdiction, his jurisdiction, and consequent immunity from an action, cannot be made to depend upon the truth or falsehood of those facts, or on the sufficiency or insufficiency of the evidence adduced for the purpose of establishing them.⁵

§ 1672. It will, however, be noted that the doctrine under discussion⁶ only *protects justices* and others who have acted in a *judicial capacity*. Therefore, at common law, in an action of trespass against magistrates for issuing a warrant of distress to enforce payment of a rate, they have no defence should the rate prove invalid; for the rate must be good in order to give them jurisdiction, but they cannot themselves give judicially any conclusive decision as to its validity, and consequently their warrant is not any evidence, still less conclusive evidence of any fact on which the validity of the rate depends; and this whether the rate was a highway rate⁷ or a borough rate, for

¹ *Supra*, § 1669.

² 5 & 6 W. 4, c. 50, § 73.

³ *Mould v. Williams*, 1844, 5 Q. B. 473.

⁴ *Basten v. Carew*, 1825, 3 B. & C. 652.

⁵ *Cave v. Mountain*, 1840, 9 L. J. M. C. 90, cited with approbation in *R. v. Bolton*, 1841, 1 Q. B. 74; *In re*

Clarke, 1842, 2 Q. B. 619; *Anon.*, 1830, 1 B. & Ad. 382; *R. v. Walker*, 1843, 2 M. & Rob. 446, 457; *Gray v. Cookson*, 1812, 16 East, 13; *R. v. Hickling*, 1845, 15 L. J. M. C. 23.

⁶ Set out *supra*, § 1669.

⁷ *Mould v. Williams*, 1844, 5 Q. B. 473; *Weaver v. Price*, 1832, 3 B. & Ad. 409; *Morrell v. Martin*, 1841, 3

which a warrant of distress has been issued.¹ As to distress §§ 1672—
warrants issued by justices to compel the payment of a poor rate 1674.
it is provided that "where any poor-rate shall be made, allowed, and published, and a warrant of distress shall issue against any person named and rated therein, no action shall be brought against the justice or justices who shall have granted such warrant, by reason of any irregularity or defect in the said rate, or by reason of such person not being liable to be rated therein." ²

§ 1673. A judgment is often tendered in evidence, not merely to prove its existence and legal consequences, or to protect the party who pronounced it against legal proceedings, but also to *conclude an opponent* upon the *facts determined*. For this purpose, the rules which govern its effect will vary according to the nature of the judgment. If it be a *judgment in rem*, it will bind all persons whomsoever; and this was probably so under the old practice of pleading even although it had not been pleaded.³ If it be a *judgment inter partes*, it will, in general, bind only parties and privies thereto;⁴ and even as against them, it was not, even under the old practice, regarded as absolutely conclusive evidence, unless it was specially pleaded by way of estoppel. Where the point could have been taken on the pleadings,⁵ a judgment whether in *rem* or *inter partes* must in order to act as an estoppel be a judgment of a court of competent jurisdiction, therefore a judgment of a court on a matter beyond its jurisdiction binds neither strangers nor parties or privies.⁶

§ 1674. A *judgment in rem* has been defined as "an adjudication pronounced, as its name indeed denotes, upon the *status*

M. & G. 593; *Ld. Amherst v. Ld. Somers*, 1788, 2 T. R. 372; *Nicholls v. Walker*, 1634, Cro. Car. 394.

¹ *Fernley v. Worthington*, 1840, 1 M. & Gr. 491. See *Newbould v. Coltman*, 1851, 20 L. J. M. C. 149.

² 11 & 12 V. c. 44 ("The Justices Protection Act, 1848"), § 41.

³ *Hannaford v. Hunn*, 1825, 2 C. & P. 155; *Cammell v. Sewell*, 1860, 3 H. & N. 646, 5 H. & N. 728; *Magrath v. Hardy*, 1838, 6 Scott, 627.

⁴ 2 Smith, L. C., 11th Ed. 751, 2.

See, however, post, § 1688.

⁵ Ante, § 91. Under the present pleading rule, Ord. XIX. r. 4, every pleading must now contain a statement in a summary form of the material facts on which the party pleading relies for his claim or defence; under this rule it is submitted that estoppels by judgments both *in rem* and *in personam* should be pleaded where possible.

⁶ *Toronto Ry. Co. v. Corporation of Toronto*, [1904] A. C. 809.

§ 1674. of some particular subject-matter, by a tribunal having competent authority for that purpose."¹ It would be perhaps more complete to add that it is an adjudication which not merely declares the status of the person or thing adjudicated on, but actually renders the status of the person or thing such as it declares it to be.² It has been pointed out in a recent case³ that there is "no distinction between a judgment in rem and a judgment in personam excepting that in the one the point adjudicated upon (which in a judgment in rem is always as to the status of the res) is conclusive against all the world as to that status, whereas in the other the point, whatever it may be, which is adjudicated upon, it not being as to the status of the res, is only conclusive between parties and privies." In general, therefore, a judgment in rem furnishes *conclusive* proof of the facts adjudicated, as well against *strangers* as against parties, and concludes all persons from saying that the status of the thing adjudicated upon is not such as is declared by the adjudication:⁴ this rule does not, however, appear to extend to all judgments which come within the definition given above, thus, inquisitions in lunacy, inquisitions post mortem, and other inquisitions, which are regarded as judgments in rem, so far as to be admissible in evidence of the facts determined against all mankind, are not considered as conclusive evidence.⁵ An inquisition in lunacy, for instance,⁶ though admissible against strangers, is not conclusive proof of what was the state of mind of the supposed lunatic at the time of the inquiry.⁷ A similar rule also applies to most other

¹ 2 Smith, L. C., 11 Ed. 752. A judgment *in rem* has in Ireland been defined as "a judgment of a court having special jurisdiction over the subject matter," see *McDonall v. Alcorn*, 1 Ir. R. 274, 278, this appears, however, to be inaccurate. See Smith, L. C., 11th Ed. 754.

² See Smith, L. C., 11th Ed. 754.

³ *Ballantye v. Mackinnon*, [1896] 2 Q. B. 455 at p. 462.

⁴ *R. v. Hartington*, 1855, 4 E. & B. 780; *Cammell v. Sewell*, 1860, 3 H. & N. 646; *Simpson v. Fogo*, 1860, 1 J. & H. 18; *Castrique v. Imrie*, 1860, 8 C. B. (N.S.) 405.

⁵ *The Irish Society v. Bp. of Derry*, 1846, 12 Cl. & Fin. 666 (H. L.).

⁶ See 53 V. c. 5 ("The Lunacy Act, 1890"), Part III.

⁷ *Faulder v. Silk*, 1811, 3 Camp. 126; *Hassard v. Smith*, 1872, Ir. R. 6 Eq. 429; *Dane v. Kirkwall*, 1838, 8 C. & P. 683; *Frank v. Frank*, 1840, 2 M. & Rob. 315; *Sargeson v. Sealy*, 1742, 2 Atk. 412; *Bannatyne v. Bannatyne*, 1852, 2 Roberts. 475; *Hume v. Burton*, 1785, 1 Ridg. P.C. 204; *Den v. Clark*, 1828, 5 Halst. 217 (Am.); *Hart v. Deamer*, 1831, 6 Wend. 497 (Am.). See *Prinsep* and

inquisitions.¹ A criminal conviction is not conclusive in a subsequent proceeding of the facts necessary to be proved to obtain the conviction, and is subject to the same rules of evidence as an ordinary judgment *inter partes*,² indeed, such a judgment would not seem to be a judgment *in rem* at all except, perhaps, in so far as a conviction for felony amounts to a judgment that the person convicted is a felon. An order made in affiliation proceedings is not a judgment *in rem*,³ neither is an order to wind up a company.⁴

§ 1675. For the reasons above appearing, the definition of a judgment *in rem*, which has just been given, cannot be considered as absolutely perfect. Yet it would be extremely difficult, if not impossible, to enunciate another which would be open to fewer objections. Without, therefore, attempting a hopeless task, such definition will be sufficient for all practical purposes, especially when supplemented by the list in the footnote.⁵

E. India Co. v. Dyce Sombre, 1856, 10 Moo. P. C. C. 232. An order made by a master in Lunacy reciting that the defendant was, in the opinion of the master, a person of unsound mind, though not so found by inquisition, although not conclusive, is *prima facie* evidence of the facts stated therein being an order made by a competent tribunal in a matter within its jurisdiction: *Harvey v. Rex*, [1901] A. C. 601.

¹ *Stokes v. Dawes*, 1826, 4 Mason, 268 (Am.) (Story, J.). In *Jones v. White*, 1717, 1 Str. 68, the court was divided as to whether a coroner's inquest, finding a person who had destroyed himself lunatic, was admissible at all as evidence of his insanity on an issue on that fact. An inquisition by a sheriff's jury, taken prior to "The Interpleader Act" (1 & 2 W. 4, c. 58), for the purpose of ascertaining to whom goods seized under a *fi. fa.* belonged, has been held wholly inadmissible, as not being an inquisition under the Sovereign's writ, but merely a proceeding by the sheriff of his own authority: *Glossop v. Pole*, 1814, 3 M. & Selw. 175; *Latkow v. Eamer*, 1795, 2 H. Bl. 437. See *Read v. Victoria St. and Pimlico Rail. Co.*, 1863, 32 L. J. Ex. 167; *Horrocks v.*

Metropol. Rail. Co., 1863, 4 B. & S. 315; *Chapman v. Monmouths. Rail. and Can. Co.*, 1857, 2 H. & N. 267; and *R. v. Lond. & N. West. Rail. Co.*, 1854, 3 E. & B. 443, as to the effect of an inquisition before a sheriff's jury under § 68 of "The Lands Clauses Consolidation Act, 1845" (8 & 9 V. c. 18).

² *R. v. Turner*, 1832, 1 Moody, C. C. 347; *R. v. Ratcliffe*, 1832, 1 Lewin, C. C. 122; *R. v. Blakemore*, 1852, 2 Den. 410; *Keable v. Payne*, 1838, 7 L. J. Q. B. 218; *Blakemore v. Glamorg. Can. Co.*, 1835, 2 C. M. & R. 133 (Parke, B., explaining *Smith v. Rummens*, 1807, 1 Camp. 9); and *Hathaway v. Barrow*, 1807, 1 Camp. 151. See post, § 1693.

³ *Anderson v. Collinson*, [1901] 2 K. B. 107.

⁴ In *re Bowling and Welby's Contract*, [1895] 1 Ch. 663.

⁵ Judgments *in rem* include the following:—*Administration grants* (*Bouchier v. Taylor*, 1776, 4 Bro. P. C. 708; *Prosser v. Wagner*, 1856, 1 C. B. (n.s.) 289); *Admiralty* adjudications on the subject of prize (*Le Caux v. Eden*, 1781, 2 Doug. 612; *Lindo v. Rodney*, 1782, 2 Doug. 614), or for the enforcement of a maritime lien (*The City of Mecca*, 1880, 5 P. D. 28, the original action

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1675.

§ 1676.

§ 1676. Judgments in rem are so far conclusive, not only against the parties who were the actual litigants in the cause,

in which case was to recover damages for collision), and in some other proceedings in rem in the Court of Admiralty (see *Harmer v. Bell*, 1851, 7 Moo. P. C. C. 267; and see, also, *Cammell v. Sewell*, 1860, 3 H. & N. 617; 5 H. & N. 742; *Simpson v. Fogo*, 1860, 1 Johns. & Hem. 18; 1 H. & M. 195; *Castrique v. Imrie*, 1869, L. R. 4 H. L. 414; and *Imrie v. Castrique*, 1860, 8 C. B. (N.S.) 405 (Ex. Ch.), overruling *Castrique v. Imrie*, 1860, 8 C. B. (N.S.) 1); *Bankruptcy* adjudications (see post, § 1747). The dismissal of a bankruptcy petition, however, is not even *res judicata* and the same creditor can take fresh proceedings in bankruptcy in respect of the same debt (*In re Vitoria*, [1894] 2 Q. B. 387; *King v. Henderson*, [1898] A. C. 720); *Condemnations* of property as forfeited, whether such judgments were pronounced by the old Court of Exchequer (*Geyer v. Aquilar*, 1798, 77 R. 696; *Scott v. Shearman*, 1775, 2 W. Bl. 977; *Cooke v. Sholl*, 1793, 5 T. R. 255), or now by the King's Bench Division on the Revenue side, or by the Commissioners or sub-commissioners of Excise, Inland Revenue (12 & 13 V. c. 1, § 3), or Customs (as to which latter, see *Maingay v. Gahan*, 1793, Ridg. L. & S. 1, 79 (Ex. Ch. Ir.), expressly overruling *Henshaw v. Pleasance*, 1777, 2 W. Bl. 1174, a decision which, according to *Fitzgibbon, C.* (see *Maingay v. Gahan*, 1793, Ridg. L. & S. 1, 79), was reprobated by *Ld. Mansfield* in an undated case of *Dixon v. Cock*, and was frequently condemned by *Lifford, C.*, while *Roberts v. Fortune*, 1742, 1 Harg. L. Tracts, 468, n. (Lee, C.J.); *Terry v. Huntington*, 1669, Hardr. 480; and *Fuller v. Fotch*, 1695, Carth. 346, are also at variance with it); *Court-martial* sentences (*R. v. Suddis*, 1801, 1 East, 306; *Hannaford v. Hunn*, 1825, 2 C. & P. 155; *Grant v. Gould*, 1792, 2 H. Bl. 100); *Deprivation and Expulsion* sentences, whether delivered by the Spiritual Court, a visitor of a college (*Phillips v. Bury*, 1788, 3 T. R. 346, as to

which, see *R. v. Grundon*, 1775, 1 Cowp. 322); "*The Legitimacy Declaration Act, 1858*": decrees made under that Act (21 & 22 V. c. 93) (as to which, see *Shedden v. Atten. Gen. and Patrick*, 1860, 30 L. J. P. M. 217); *Matrimonial suits* judgments, in which are included sentences of divorce *a mensâ et thoro* under the old law (*R. v. Grundon*, 1775, 1 Cowp. 322; *Day v. Spread*, 1842, Jebb & B. 163 (Ir.)); decrees of judicial separation under the existing law (20 & 21 V. c. 85 ("The Matrimonial Causes Act, 1857"), §§ 7 and 16), decrees dissolving marriage (id. §§ 27 and 31), and also other decrees in matrimonial suits (*Da Costa v. Villa Real*, 1734, 2 Str. 961; *Bunting's case*, 1585, 4 Co. Rep. 29; *Kenn's case*, 1607, 7 Co. Rep. 42; *Perry v. Meadowcroft*, 1846, 10 Beav. 122; *Harrison v. Corp. of Southampton*, 1853, 22 L. J. Ch. 372; but see *Goodin v. Smith*, 1831, Milw. Ecc. R. 243), provided that the status of the parties be affected thereby (*Needham v. Bremner*, 1866, L. R. 1 C. P. 583; *Conradi v. Conradi*, 1868, L. R. 1 P. & D. 514), a decree of divorce, however, in a case in which A. was co-respondent stating that the jury found that the respondent had been guilty of adultery with the co-respondent, but which contained no finding that the co-respondent had been guilty of adultery with the respondent, is not sufficient evidence of the adultery of A. in subsequent divorce proceedings against him (*Ruck v. Ruck*, [1896] P. 152). Even although a decree nisi for divorce has been set aside on some other ground, the finding of the jury of adultery and cruelty is conclusive evidence *inter partes* in a subsequent suit (*Butler v. Butler*, [1894] P. 25). But not decrees in suits for jactitation of marriage, unless, perhaps, in cases where the defendant pleads a marriage, and the court decides on the truth of that plea (*R. v. Duchess of Kingston*, 1776, 20 How. St. Tr. 544); *Outlawry* judgments (Co. Lit. 352 b), which in civil proceedings

but against all others, that, unless it can be shown, either that the court had no jurisdiction,¹ or that the judgment was obtained by fraud or collusion,² no evidence can be generally admitted, at least, in any civil cause,³ for the purpose of disputing the status of the res adjudicated on. This rule rests partly upon the ground that judgments in rem not merely declare the status of the subject-matter adjudicated upon, but, ipso facto, render it such as they declare it to be; and partly, if not principally, upon the broad ground of public policy, that the social relations of every member of the community should not be left doubtful, but that, after having been once clearly defined by solemn adjudication, they should ever after remain at rest.

§§ 1676,
1677.

§ 1677. A judgment in rem is accordingly binding upon all the world as to the precise point directly decided, and cannot be impeached by showing that the facts on which it immediately rests are false. Yet, like any other judgments, it is conclusive only as to the point actually decided,⁴ and not as to points which incidentally come in question; thus where the facts upon which it rests are put directly in issue in a subsequent suit, the

are now abolished by "The Civil Procedure Acts Repeal Act, 1879" (42 & 43 V. c. 59), § 3; *Probate* grants, probably (*Noel v. Wells*, 1669, 1 Lev. 235; *Allen v. Dundas*, 1789, 3 T. R. 125); but, although the probate may be conclusive evidence of the title of the executors so long as the decree for probate is in existence a person who was not a party to the suit in which the probate was decreed and who could not have intervened in that suit, is entitled to move to revoke the probate on the ground that the will, probate of which had been decreed, was a forgery (*Young v. Holloway*, [1895] P. 87); *Road* orders made by justices for dividing roads, under the Act of 34 G. 3, c. 64 (*R. v. Hickling*, 1845, 7 Q. B. 880); and the decision of justices under § 8 of "The Private Street Works Act, 1892" (55 & 56 V. c. 57), that a road is a highway repairable by the inhabitants at large (*Wakefield Corporation v. Cooke*, [1904] A. C. 31), but not a similar

finding under § 150 of the Public Health Act, 1875 (38 & 39 V. c. 55 (*R. v. Hutchins*, 1881, 6 Q. B. D. 300), because under that provision the justices had no jurisdiction to adjudicate on the status of the road (see *Wakefield Corp. v. Cooke*, supra); and *Settlement* adjudications made by an order of justices, whether unappealed against (*Uxbridge Union v. Winchester Union*, 1904, 91 L. T. 533; *R. v. Kenilworth*, 1788, 2 T. R. 599), or confirmed by a Court of Quarter Sessions on appeal (*R. v. Wick St. Lawrence*, 1833, 5 B. & Ad. 533).

¹ Post, §§ 1714 et seq.

² *R. v. Duch. of Kingston*, 1776, 20 How. St. Tr. 544. See post, § 1713.

³ As to the effect of judgments in rem in criminal trials, see post, § 1680.

⁴ *Att.-Gen. v. King*, 1817, 5 Price, 195; *Concha v. Concha*, 1886, 11 A. C. 541.

§§ 1677,
1678.

judgment does not,—with one exception, which will be presently mentioned,¹—furnish *conclusive* evidence of their truth, however necessary it may have been for the court proceeding in rem to have determined those facts before it adjudicated upon the principal point.² For instance, the Ecclesiastical Courts were not, and the existing Probate Division of the High Court is not, authorised to grant letters of administration, unless the intestate be *dead*. But such letters are not, in another court, conclusive evidence of the death.³ But since probate cannot be granted until the Probate Division is satisfied of the genuineness of the will, the title of the executor, to whom probate has been granted, cannot, so long as the probate remains unrevoked,⁴ be impeached in a civil court by showing that the will was forged.⁵ If, however, a party be indicted for forging a will, the probate of it will not be conclusive, if indeed it be *prima facie*, evidence in his favour.⁶ Neither will the production of a probate preclude a party from showing in a civil court, either that the testator was insane at the time when he executed the will,⁷ or that his domicile was not then in England,⁸ although, if the object of this evidence were to impeach the title of the executor it would be inadmissible.⁹

§ 1678. An exception to the rule that a judgment in rem does not in general, in a subsequent and distinct action in a civil court, conclusively prove the truth of the facts on which such judgment in rem was founded, exists in cases where it appears on the face

¹ Post, § 1678.

² See *Bailey v. Harris*, 1849, 18 L. J. Q. B. 115.

³ See *Thompson v. Donaldson*, 1800, 3 Esp. 63; *Moons v. De Bernales*, 1856, 1 Russ. 301; *French v. French*, 1755, 1 Dick. 268. They even were, on one or two of the above occasions, held (sed qy.) not to be *prima facie* evidence of the death. But the grant of probate by a foreign court of competent jurisdiction in the Probate Division in England raises a sufficient presumption of death for the English court to grant probate. See *In the goods of Spenceley*, [1892] P. 255. And in an Irish court, where the question was whether a child had been born alive or dead, *Sugden, L.C.*, held, that a

grant of letters of administration to its effects was a fact from which, in the absence of evidence to the contrary, he was bound to presume that the child was born alive: *Reilly v. Fitzgerald*, 1843, 6 Ir. Eq. R. 335.

⁴ *Young v. Holloway*, [1895] P. 87.

⁵ *Noel v. Wells*, 1669, 1 Lev. 235.

⁶ *R. v. Buttery*, 1818, R. & R. 342; *R. v. Gibson*, 1802, R. & R. 343 (Ld. Ellenborough), overruling *R. v. Vincent*, 1721-2, 1 Str. 481.

⁷ *Marriot v. Marriot*, 1725-6, 1 Str. 671.

⁸ *Whicker v. Hume*, 1858, 7 H. L. C. 124; *Bradford v. Young*, 1884, 29 Ch. D. 617.

⁹ See cases in last two notes.

§ 1678.

of the proceedings in rem that the very fact in dispute in the subsequent civil action was the one chiefly in dispute in the former suit, and that it was actually decided in such former proceedings. For if the same fact be again controverted between the *same parties*, or persons claiming under them,¹ whether in the same or in a different court, the judgment in rem will, almost universally,² be conclusive upon the question. For instance, if, in a suit for administration, the sole question be, which of two parties is next of kin to the intestate, the sentence of the Probate Division, declaring "that, as far as appears by the evidence, the defendant has proved himself next of kin," and directing that administration be granted to him as such, will, in a subsequent action between them for distribution, instituted in the Chancery Division, be conclusive evidence of the relative relationship of the parties.³ The judgment in such a case would be equally conclusive on the parties, even if the question of kindred had been determined by the court as a point of law, not as a matter of fact.⁴ On similar principles, the dismissal of a wife's petition for judicial separation charging cruelty, is a bar to a subsequent petition for a dissolution of the marriage charging the same cruelty coupled with adultery,⁵ and the finding of a matrimonial court that a husband has been guilty of adultery, although the decree has been revoked on the ground of collusion and suppression of material facts, is conclusive in a subsequent suit by the husband against the wife;⁶ on appeal against an order removing three paupers as the children of A. and B., an order for the removal of "A. and *his wife* B." from the respondent to the appellant parish, which had been previously confirmed on appeal, was held to conclusively estop the appellants from showing that the children were illegitimate, in consequence of A. having committed bigamy in marrying B.;⁷ and in general, orders of removal

¹ See *Spencer v. Williams*, 1871, L. R. 2 P. & D. 230.

² See post, § 1685.

³ *Barrs v. Jackson*, 1845, 14 L. J. Ch. 433 (Ld. Lyndhurst); *Bouchier v. Taylor*, 1776, 4 Bro. P. C. 708; *Dogliani v. Crispin*, 1866, L. R. 1 H. L. 301.

⁴ *Thomas v. Ketteriche*, 1749, 1

Ves. Sen. 333 (Ld. Hardwicke, recognised by Ld. Lyndhurst in *Barrs v. Jackson*, 1845, 14 L. J. Ch. 433.

⁵ *Finney v. Finney*, 1868, L. R. 1 P. & D. 483.

⁶ *Butler v. Butler*, [1894] P. 25.

⁷ *R. v. Woodchester*, 1742-3, Burr. S. C. 191; *R. v. St. Mary, Lambeth*, 1796, 6 T. B. 615.

§§ 1678—1680. —unappealed against, or confirmed on appeal, are not merely evidence, but are conclusive, as to all the *facts mentioned* in them, which are *necessary steps* to the decision.¹

§ 1679. If there be two judgments or orders which would be inconsistent if the same facts existed at the time when each of them was pronounced, the one which is founded upon the later state of facts will prevail.² In the case in which this was established, subsequently to an order having been made for the removal of a pauper and his wife and their six children, and confirmed on appeal, the Spiritual Court had declared the marriage of these paupers void as incestuous.³ The Court of Queen's Bench decided that a *new state of facts* had arisen since the earlier order, inasmuch as the marriage which, when that was made, was only voidable, had since been declared by competent authority to be void.

§ 1680. A judgment in rem of a competent court is strong *prima facie* evidence in a criminal case, on behalf of the person in whose favour such judgment was given: but it is not conclusive. Such a judgment was, indeed, at one time thought to be *conclusive* evidence in such person's favour, and it was considered that it could not be impeached even on the grounds of fraud or collusion.⁴ Several old cases decided, for instance, that the probate of a will being produced from the proper court, afforded a conclusive defence against an indictment for forgery of that will;⁵ and that a sentence of a competent Ecclesiastical Court as to whether a marriage had taken place or not, must be regarded as similarly conclusive.⁶ In the latter half of the 18th century, however, the notorious Duchess of Kingston having succeeded in obtaining from a proper Ecclesiastical Court a sentence declaring a marriage, which was said to have been contracted by her in early life, to be invalid, triumphantly put it in evidence as being *conclusive* against the Crown, when she was subsequently indicted for committing bigamy by another marriage later in life. But in

¹ *R. v. Wye*, 1838, 7 A. & E. 770; *R. v. Hartington*, 1855, 4 E. & B. 780.

² *R. v. Wye*, 1838, 7 A. & E. 770.

³ See now 5 & 6 W. 4, c. 54 ("The Marriage Act, 1835").

⁴ See note to 2 *Strange*, 961, citing

a case of *Prudam v. Phillips*, 1737-s, 2 Amb. 763.

⁵ *R. v. Vincent*, 1720-1, 1 Str. 481 (King, C.J.).

⁶ *Da Costa v. Villa Real*, 1733-4, 2 Str. 961.

1776, all the judges unanimously advised the House of Lords that the judgment in rem of a competent court, even if it be not impeachable on grounds of fraud or collusion, is not *conclusive* in a criminal case; and that even if it were otherwise conclusive, it might be impugned for fraud or collusion. This having been the very point for decision in the case, neither can the actual decision be doubted or disregarded, nor can any expressions of opinion as to the reasons for the conclusion established by the judgment be regarded as merely obiter dicta. The decision in the Duchess of Kingston's case no doubt overruled the earlier cases to which we have referred, as far as they were authorities for regarding a judgment in rem to be *conclusive* in a subsequent criminal case, and not to be liable to be impugned for fraud or collusion. Such decision was followed by Lord Ellenborough, some twenty-seven years later, in a case which arose at the Lancaster Summer Assizes, 1802,¹ when a man, who was indicted for forging a will, having tendered in evidence the probate of that will as establishing a defence to the indictment, it was held not to be conclusive, and the man was convicted; and a like conclusion was come to by nine of the judges, in a similar case, which arose some sixteen years later.² At first sight, however, the judgment in a much later case than any of these appears to be inconsistent with the Duchess of Kingston's case, as when, in 1845, the inhabitants of a parish were indicted for not repairing a road, an order of justices apportioning part of the locus in quo to the parish represented by the defendants for the purposes of repair, and made in pursuance of the statutory form for that purpose provided by a Highway Act then in force,³ was held to be *conclusive* of the liability of the defendant parish to repair the locus in quo, and to prevent them from proving that it in fact was not within their parish.⁴ But this last case appears entitled to no great weight, since, besides being apparently not in accord with the

¹ R. v. Gibson, 1802, R. & R. 343.

² R. v. Buttery, 1818, R. & R. 342. The general effect of this case would appear to be as stated in the text; but it, perhaps, may be contended that the case does not support the decision in the Duchess of Kingston's case, on the ground that the pro-

duction of the probate would not be conclusive, even in a civil action in which it was not sought to dispute the title of the executor.

³ Viz., 34 G. 3, c. 64.

⁴ R. v. Hickling, 1845, 15 L. J. M. C. 23.

§§ 1680— decision in the *Duchess of Kingston's case*, it assumes to follow the principle of the "*Bumboat case*," which has been already referred to on a previous page;¹ but the fact that the "*Bumboat case*" was an instance of a civil *action* and not of a criminal proceeding, was entirely overlooked.

1682.

§ 1681. No case, at any rate, has suggested that a previous judgment in rem deciding the substantial point again in issue will not afford strong presumptive evidence in favour of the party for whose benefit it operates, or that if it be left unanswered, a jury will not, in the great majority of cases, act upon it. At the same time, the majority of the cases previously referred to, as establishing a previous judgment in rem to be "conclusive" on a subsequent criminal trial, are for the most part only reported very shortly, and may probably be explained as instances in which a jury were, in *point of fact*, driven by the circumstances to a conclusion, which the language of the reporter is capable of being construed to have been a *conclusion of law* instead of, as it really was, a mere finding of fact, which had been rendered inevitable by the circumstances. Another case,² where on an indictment for an assault on a Cambridge undergraduate, by turning him out of the College garden, the production of a previous sentence of expulsion from the College by the College Visitor, was held to constitute a conclusive defence, may also be explained in the same way.

§ 1682. Judgments *inter partes*, or, as they are sometimes called, judgments *in personam*, are not,—with one exception,—admissible either for or against *strangers* in proof of the facts adjudicated.³ They are not admissible against them, because it is an obvious principle of justice, that no man ought to be bound by proceedings to which he was a stranger, and over the conduct of which he could, therefore, have exercised no control; or, to express the same sentiments in technical language, *res inter alios actæ alteri nocere non debent*;⁴ and they cannot be

¹ *Brittain v. Kinnaird*, 1819, 4 Moore, C. P. 50; cited ante, § 1670.

² *R. v. Grundon*, 1775, 1 Cowp. 322.

³ See *Shedden v. Att.-Gen. and Patrick*, 1861, 30 L. J. P. & M. 217.

⁴ B. N. P. 232.

received in favour of strangers even as against a party thereto, §§ 1682—1684. because it is thought, with very questionable propriety, that a rule that they should afford any evidence might work injustice, unless its operation were *mutual*.¹

§ 1683. The one *exception*, that judgments are not evidence against strangers, which has just been referred to, arises in the case of adjudications upon subjects of a *public nature*,² like customs,³ prescriptions,⁴ tolls,⁵ boundaries between parishes, counties, or manors,⁶ rights of ferry,⁷ liabilities to repair roads⁸ or sea-walls,⁹ moduses,¹⁰ and similar things. In all cases of this nature, evidence of reputation being admissible, adjudications,—which for this purpose are regarded as a species of reputation,—will also be received, whether the parties in the second suit be those who litigate the first, or be utter strangers.¹¹ If the litigants in the second suit be strangers to the parties in the first, the judgment, however, will not be conclusive.¹² If the parties be the same to both suits the result of the first suit will of course, bind them in the second.

§ 1684. A judgment *inter partes* is always,—save in one rare case, which will be mentioned in the next section,—admissible for or against *parties* or *privies*, where the same subject-matter is a second time in controversy between the same parties or persons claiming under them,¹³ and this, whether it be

¹ *Smith v. Rummens*, 1807, 1 Camp. 9; *Hathaway v. Barrow*, 1807, 1 Camp. 151; *Blakemore v. Glamorganshire, &c., Co.*, 1835, 2 C. M. & R. 133; Co. Lit. 352 *a*, cited and approved in *Gaunt v. Wainman*, 1836, 3 Bing. N. C. 70 (Tindal, C.J.); and in *Doe v. Errington*, 1840, 6 Bing. N. C. 79 (*id.*); ante, § 99. See, also, *Greely v. Smith*, 1846, 1 Woodb. & M. 181 (Am.).

² *Mulholland v. Killen*, 1874, Ir. R. 9 Eq. 471.

³ *Reed v. Jackson*, 1801, 1 East, 357; *Berry v. Banner*, 1792, Peake, R. 156.

⁴ *Id.*

⁵ B. N. P. 233.

⁶ *Brisco v. Lomax*, 1838, 3 N. & P. 308; *Evans v. Rees*, 1839, 10 A. & E. 151.

⁷ *Pim v. Curell*, 1840, 6 M. & W.

234; *Hemphill v. M'Kenna*, 1845, 8 Ir. L. R. 43.

⁸ *R. v. St. Pancras*, 1794, Peake, R. 220; *R. v. Haughton*, 1853, 22 L. J. M. C. 89.

⁹ *R. v. Leigh*, 1840, 10 A. & E. 398.

¹⁰ *Croughton v. Blake*, 1843, 13 L. J. Ex. 78.

¹¹ Cases cited in last nine notes; ante, §§ 624—627.

¹² *Reed v. Jackson*, 1801, 1 East, 357; *Croughton v. Blake*, 1843, 13 L. J. Ex. 78.

¹³ *Duch. of Kingston's case*, 1776, 20 How. St. Tr. 538; B. N. P. 232; *Ferrers v. Arden*, 1599, 6 Co. Rep. 7; *Sopwith v. Sopwith*, 1861, 30 L. J. P. & M. 131; *Houston v. Marquis of Sligo*, 1885, 29 Ch. D. 448 (C. A.), showing the report of a judge in an Irish suit to be admissible.

§§ 1684,
1685.

a judgment in a contested case or a judgment by consent or by default.¹ When it states a *debt* it is *prima facie* evidence of such debt, but if there are circumstances of suspicion attending it, the court may require the person alleging it to prove such debt.² Probably, in no case will it be regarded as quite conclusive of the rights in dispute unless perhaps where it is pleaded as matter of estoppel;³ but certainly it will furnish highly cogent evidence, which cannot be disregarded by a jury, excepting upon good and substantial grounds.⁴ The conclusive effect of judgments respecting the same cause of action, and between the same parties, rests upon the just and expedient axiom, that it is for the interest of the community that a limit should be opposed to the continuance of litigation, and that the same cause of action should not be brought twice to a final determination.

§ 1685. The one rare case referred to in the preceding section in which a judgment in a suit *inter partes* is not admissible in another suit against one who was a party to the original suit, arises in the unfrequent event of two suits being tried on principles which are different so far as relates to the admissibility of evidence. When this has occurred, the judgment obtained in the first suit, whether it be one *inter partes* or *in rem*, cannot be received as any evidence of the facts adjudicated thereby when they are again in dispute. For example, in a suit by a husband for dissolution of marriage on the ground of his wife's adultery, the wife could not, prior to the 9th of August, 1869,⁵ in support of her answer charging cruelty and desertion, rely on a decree of judicial separation which she had already obtained on these grounds, after having been examined herself as a witness.⁶ For in the second suit her testimony was under the old law, inadmissible; and to admit

¹ *In re South American and Mexican Co.*, [1895] 1 Ch. 37; *Joint Committee of the River Ribble v. The Croston Urban District Council*, [1897] 1 Q. B. 251.

² *In re Tollemache, Ex parte Anderson*, 1885, 14 Q. B. D. 606.

³ *Ante*, § 91, § 1673; *Joly v. Swift*, 1847, 11 Ir. Eq. R. 410; *Nowlan v.*

Gibson, 1847, 12 Ir. L. R. 5.

⁴ *Outram v. Morewood*, 1803, 3 East, 365; *R. v. Blakemore*, 1852, 21 L. J. M. C. 60.

⁵ When "The Evidence Further Amendment Act, 1869," § 2 & 33 V. c. 68, passed. See *ante*, § 1355.

⁶ *Stoate v. Stoate*, 1861, 30 L. J. P. & M. 102; *Bancroft v. Bancroft* and

a decree which might have been obtained by the aid of such evidence, would in effect have been to admit the wife's evidence at second hand, and thus do indirectly what the law forbade to be done directly. §§ 1685—1686.

§ 1685A. A case which may be classed as an exception to the general rule that a judgment is conclusive *inter partes* upon the facts decided is that of a petition to revoke a patent. In such a case it appears that the respondent will not be estopped from alleging the validity of the patent, although it has been held to be invalid in a previous suit in which the petitioner and respondent were parties, the reason apparently being that "a petition to revoke a patent by whomsoever presented is a petition on behalf of the public, and it is not personal to the petitioner," and in a legal point of view it is a mere accident that the petitioner was a party to the former litigation.¹

§ 1686. When the term "parties" is used as denoting those who are privy to a judgment the law includes under it *all* those as "*parties*" who are *individually named in the record*, and consequently entitled to prosecute or defend the cause, to adduce testimony, to cross-examine witnesses called on the other side, and to appeal from the judgment, should an appeal be allowable by law.² Thus, where the heir-at-law of a testator has been a defendant as one of the testator's next of kin in a probate action to establish the will, he cannot in a subsequent proceeding dispute the validity of the will in respect of real estate affected by it, notwithstanding that he was not cited to appear in the original action as heir-at-law.³ Even a party, sued as the public officer of a corporation, is amenable to this rule, though the judgment relied on was obtained *en autre droit*.⁴ However, a *procchein amy* or next friend is not such a party, being considered simply as a person appointed by the court to look after the interests of the infant or lunatic, and to manage

Rumney, 1865, 34 L. J. P. & M. 14. But in *Sopwith v. Sopwith*, 1861, 30 L. J. P. & M. 131, the Judge Ordinary, while verbally recognising the exception as above stated, practically set it at nought. See, also, *Bland v. Bland*, 1866, 35 L. J. P. & M. 104.

¹ In *re Deely's Patent*, [1895] 1

Ch. 687.

² *Duch. of Kingston's case*, 1776, 20 How. St. Tr. 538, n.

³ *Beardsley v. Beardsley*, [1899] 1 Q. B. 746.

⁴ *Spencer v. Thompson*, 1856, 6 Ir. C. L. R. 537, 565.

§§ 1686,
1687.

the suit for him.¹ But the infant himself is in such cases a party, and consequently bound by the judgment in any action brought in his name by any duly appointed prochein amy, even though the suit may have been instituted and conducted without his authority or knowledge.² Neither will the law, in such a case, recognise any distinction between infants of tender and of mature years. Therefore, where the wife of a minor committed adultery, whilst her husband was abroad in the East Indies, and his father, having procured himself to be appointed prochein amy, without his knowledge, commenced an action of crim. con. in the son's name, it was held that the son would be bound by the judgment in this action.³ Generally, however, a person sui juris who has been made a party to a suit without his knowledge or consent, will not be bound by the proceedings. Therefore, if a plaintiff, instead of serving a defendant with process, thinks fit to accept the appearance of an unauthorised solicitor for him, he runs the risk of having the judgment subsequently set aside as irregular, with costs;⁴ and a debtor, who, on action brought against him, pays his debt to a solicitor who was suing him in the name, but without the authority, of the creditor, will not be thereby discharged,⁵—though the court will, in application by the debtor, stay an action brought without the authority of the plaintiff, and will compel the solicitor who has brought it to pay the costs incurred in the defence.⁶

§ 1687. Whether the term *parties* will also include persons not named in the record, but in *whose immediate and individual behalf the action has been brought or defended*, admits of some doubt. In an old case,⁷ where an action was brought to recover penalties from a servant of one Cotton for fishing in the plaintiff's fishery, and the plaintiff produced no proof in support of his right to the fishery other than the record of a verdict and judgment recovered by him against another servant of Cotton,

¹ *Sinclair v. Sinclair*, 1845, 14 L. J. Ex. 109; *Vivian v. Little*, 1883, 11 Q. B. D. 370.

² *Morgan v. Thorne*, 1841, 10 L. J. Ex. 125.

³ *Id.*

⁴ *Bayley v. Buckland*, 1847, 16

L. J. Ex. 204.

⁵ *Robson v. Eaton*, 1785, 1 T. R. 62.

⁶ *Hubbart v. Phillips*, 1845, 14 L. J. Ex. 103.

⁷ *Kinnersley v. Orpe*, 1780, 1 Doug. 58.

in a former action for a trespass committed on the same fishery, and both in the former action and in that then before the court the defendants had justified as servants acting by the orders of their master, who claimed a right to the fishery in question, *Perryn, B.*, at *Nisi Prius*, considering *Cotton* as the real defendant in both actions, held the record to be conclusive, and directed the jury to find for the plaintiff.¹ A new trial was, however, subsequently granted, the court² intimating that the record, though admissible evidence, was not conclusive. Lord *Ellenborough*, too, in a well-considered judgment,³ expressed astonishment that an estoppel in such a case could ever have been supposed possible; and (in the shape of a doubt) intimated a tolerably clear opinion that the record was wholly inadmissible, as the defendant was no party to the former action.

§§ 1687,
1688.

§ 1688. Nevertheless, under the old law of ejectment (and it was probably on a supposed analogy to this principle that the decision of *Perryn, B.*, at *Nisi Prius* in the case just cited, was founded), the lessor of the plaintiff and the tenant in possession were regarded as having been the real parties. Consequently, any judgment in such a case, whether upon verdict, or by default against the casual ejector, would be cogent, if not conclusive, evidence in any subsequent action to recover land between the same parties, brought respecting the same property.⁴ So, in *replevin*, the landlord, or other person, in whose right a defendant has made cognisance, has been held to be a party to that suit;⁵ and a person not a party to an action or summons, but fully cognisant of the proceedings and who could have intervened therein, who stands by and deliberately takes the

¹ In *Simpson v. Pickering*, 1834, 4 L. J. Ex. 20, *Alderson, B.*, says obiter, "*Kinnersley v. Orpe* shows that the verdict may be given in evidence where the parties are *really* the same." See, also, 2 Ph. Ev. 9; and *Doe v. E. of Derby*, 1834, 1 A. & E. 790 (*Littleale, J.*).

² *Buller, J.*, being a member of it.

³ In *Outram v. Morewood*, 1803, 3 East, 346. See *Case v. Reeve*, 1817, 14 Johns, 81 (Am.).

⁴ *Doe v. Huddart*, 1835, 2 C. M. & R. 316; *Doe v. Seaton*, 1835, 2

C. M. & R. 732; *Wright v. Doe d. Tatham*, 1834, 1 A. & E. 19; *Doe v. Wellsman*, 1848, 18 L. J. Ex. 277; *Armstrong v. Norton*, 1839, 2 Ir. L. R. 96; *Aslin v. Parkin*, 1758, 2 Burr. 665; *Nowlan v. Gibson*, 1847, 12 Ir. L. R. 5; *Litchfield v. Ready*, 1850, 20 L. J. Ex. 51; *Matthew v. Osborne*, 1853, 22 L. J. C. P. 241; *Doe v. Challis*, 1851, 17 Q. B. 166. See post, § 1696.

⁵ *Hancock v. Welsh*, 1816, 1 Stark. R. 347.

§§ 1688,
1689.

benefit of a decision on the construction of a will under which a particular fund is distributed, has been held to be estopped by his conduct, where the circumstances are identical, from re-opening any of the questions covered by the former judgment by means of a fresh action or summons relating to another fund under the same will, although claiming in respect of a different interest.¹ A similar rule prevails in the Probate Courts.² It would certainly be convenient and reasonable if the rule,—in conformity with that which governs admissions,³—were extended to all persons who were *substantially* parties to the former action. Indeed, it was thought that, notwithstanding the absence of direct authority, the courts would now determine in favour of such extension, and the more so, as the rule undoubtedly applies to every person who claims under, or in privity with, the original parties.

§ 1689.⁴ The term *privity* denotes mutual or successive relationship to the same rights of property; and the reason why persons standing in this relation to a litigant can rely upon, and are bound by, the proceedings to which he has been a party, is, that they are identified with him in interest.⁵ Hence all privies, whether in blood, in estate or in law, are estopped themselves, and can estop others, from litigating that which would be conclusive either against or in favour of him with whom they are in privity.⁶ Thus, where a general right has been fairly contested, and established against a representative class, persons included in the class represented, though not actual parties to the suit, will be still bound by the decision.⁷ Consequently, a verdict and judgment for or against the ancestor may be pleaded in bar, or will furnish cogent evidence, for or against the heir, the tenant in dower, the tenant by the curtesy, the legatee, the devisee or any other person claiming under the ancestor;⁸ if several successive remainders are limited in the same deed, a judgment for one

¹ In re Lart, *Wilkinson v. Blades*, [1896] 2 Ch. 788.

² *Young v. Holloway*, [1895] P. 87; *Mohan v. Broughton*, [1899] P. 211; [1900] P. 56.

³ Ante, § 756.

⁴ Gr. Ev. in part, as to first eight lines.

⁵ Ante, § 90, § 787.

⁶ Ante, § 90.

⁷ *Comm. of Sewers of London v. Gellatly*, 1876, 3 Ch. D. 610.

⁸ *Lock v. Norborne*, 1687, 3 Mod. 141; *Outram v. Morewood*, 1803, 3 East, 346; *Whittaker v. Jackson*, 1864, 33 L. J. Ex. 181.

remainderman is evidence for the next in succession;¹ a judgment of ouster in a quo warranto, against the incumbent of an office, is conclusive against those who derive their title to office under him;² the conviction of a former owner of lands on an indictment for non-repair of a road *ratione tenuræ*, is cogent, if not conclusive, evidence of liability to repair, as against a subsequent purchaser of the same lands;³ an executor or administrator will be bound by a verdict recovered against the testator or intestate;⁴ a trustee in bankruptcy by a judgment against the bankrupt;⁵ a husband and wife by a verdict recovered against the wife before her marriage;⁶ and the same as to all grantees, mortgagees, and assignees, whose title has accrued *since* the judgment was pronounced.⁷

§ 1690. On the same principle, where a man brought an action against several persons for diverting water from his works, and had judgment; and afterwards he *and another* sued the same defendants for a similar injury to the same works; the former judgment was held cogent evidence for the plaintiffs, whose privity in estate with the former plaintiff was presumed from the fact that they were in possession of the property.⁸

§ 1691. In all the instances of privity above given, the privity has claimed, or been liable, *under or through* the original party;

¹ *Pyke v. Crouch*, 1696, 1 *Ld. Ray.* 730; *Doe v. Tyler*, 1830, 6 *Bing.* 390.

² *R. v. May*, of York, 1792, 5 *T. R.* 66; *R. v. Hebden*, 1738-9, *Andr.* 389.

³ *R. v. Blakemore*, 1852, 21 *L. J. M. C.* 60. A purchaser of land, however, is not estopped, as being privity in estate, by a judgment recovered against the vender in an action commenced after the purchase: *Mercantile Trust Co. v. River Plate Co.*, [1894] 1 *Ch.* 578.

⁴ *R. v. Hebden*, 1738, *Andr.* 389.

⁵ *In re Tollemache*, *Ex parte Anderson*, 1885, 14 *Q. B. D.* 606.

⁶ *Outram v. Morewood*, 1803. But see 33 & 34 *V. c.* 93 ("The Married Women's Property Act, 1870"), § 12; and 37 & 38 *V. c.* 50 ("The Married Women's Property Act (1870) Amendment Act, 1874"), §§ 1 and 2. Where the parties married between 9th August, 1870, and 30th July, 1874,

the former Act protects the husband from liability "for the debts of his wife contracted before marriage" (see *Conlon v. Moore*, 1875, *Ir. R.* 9 *C. L.* 190), and renders the wife responsible for such debts. Where the parties married since the last-named date, 37 & 38 *V. c.* 50, has again imposed on the husband a limited liability, in the event of his wife having brought him any fortune. As to their respective rights and liabilities, where the parties have married since 31st December, 1882, see, also, 45 & 46 *V. c.* 75 ("The Married Women's Property Act, 1882"), §§ 14, 15.

⁷ *Doe v. E. of Derby*, 1834, 1 *A. & E.* 790; *Doe v. Webber*, 1834, 3 *N. & M.* 586; *Adams v. Barnes* 1821, 17 *Mass.* 365 (*Am.*).

⁸ *Blakemore v. Glamorg., &c., Co.*, 1835, 2 *C. M. & R.* 133; *Strutt v. Bovingdon*, 1803, 5 *Esp.* 56.

§ 1691. but the same rules of law apply, where two or more persons are subject to a *joint* or *concurrent* liability. For instance, if one be sued alone upon a *joint* note, debt, or tort, the judgment against him, even *without satisfaction*, may be pleaded and proved in bar of a second suit for the *same cause* of action,¹ whether brought against the other debtor or wrong-doer, or against the joint debtors or wrong-doers. The original cause of action has been changed into matter of record, which is of a higher nature, and the inferior remedy is thus merged in the higher;² for, if a party, having joint remedies against several persons in respect of the same cause of action and who has recovered judgment against one was not estopped from proceeding against the others, he might recover damages twice over for the same thing, which would be repugnant to natural justice;³ the rule however, that a judgment, although unsatisfied, obtained against one of two joint debtors or joint tort-feasors is a bar to an action against the other, is confined to cases where the cause of action is the same; thus, an unsatisfied judgment against one joint contractor, on a cheque given by him alone for the joint debt, is not a bar to an action against the other joint contractor on the original contract.⁴ A judgment against one of several debtors on a *joint and several* debt is a bar to an action against the others only if the judgment has been satisfied.⁵ In an action on a joint contract or trespass against two defendants, one of them would

¹ See *Brinsmead v. Harrison*, 1817, L. R. 7 C. P. 547.

² *King v. Hoare*, 1844, 14 L. J. Ex. 29; *Kendall v. Hamilton*, 1879, 4 App. Cas. 504 (H. L.); *Brinsmead v. Harrison*, 1872, L. R. 7 C. P. 547; *Lechmere v. Fletcher*, 1833, 1 C. & M. 23; *Broome v. Wootton*, 1606, Yelv. 67; *Ward v. Johnson*, 1807, 13 Mass. 148 (Am.); overruling dictum (Ld. Tenterden) in *Walters v. Smith*, 1831, 2 B. & Ad. 892; and this is so even if judgment is obtained against one of two joint debtors upon an admission by him in an action in which the joint debtors are sued together: *McLeod v. Power*, [1898] 2 Ch. 295 (Byrne, J.); if, however, the plaintiff obtains judgment under Ord. XIV., or by default,

against one of several joint debtors sued together, the Rules of Court provide that he may go on against the other defendant or defendants. See Ord. XIV. r. 5; Ord. XIII. rr. 4, 7; *McLeod v. Power*, *supra*; and *Weall v. James*, 1893, 68 L. T. 515.

³ *Bird v. Randall*, 1762, 3 Burr. 1345; recognised in *Cooper v. Shepherd*, 1846, 15 L. J. C. P. 237; *King v. Hoare*, 1844, 14 L. J. Ex. 29; *Lechmere v. Fletcher*, 1833, 1 C. & M. 23 (Bayley, B.); U. S. v. *Cushman*, 1836, 2 Sumn. 426 (Am.) (Story, J.); *Farwell v. Hilliard*, 1825, 3 New Hamp. 318 (Am.). See *Godson v. Smith*, 1818, 2 Moore, C. P. 157.

⁴ *Wegg-Prosser v. Evans*, [1895] 1 Q. B. 108.

⁵ *King v. Hoare*, *supra*.

probably, under the old practice, have been allowed to plead the pendency of another action against him for the same cause.¹ But if A. be sued on a contract, the pendency of an action against B. for the same cause could not, even under the old practice, have been pleaded, for in such case A. is not twice vexed; and, therefore, his proper course is either to apply under Ord. XVI. r. 11 for B. to be joined as defendant, if B. is within the jurisdiction, or to apply to the court for a stay or consolidation of proceedings.² Although a judgment obtained *against* one of several debtors is thus a conclusive defence in an action against the others, a judgment recovered *by* one of several joint debtors is no defence to a subsequent action against the other joint debtors in respect of the same cause of action unless it appears that the judgment was recovered on a ground which operates as a discharge of all.³

§ 1692. Upon somewhat similar principles, any payment made by, or execution levied upon, a garnishee under any proceeding for the attachment of debts owing or accruing from him to a judgment debtor is made a valid discharge to the garnishee as against the judgment debtor, to the amount paid or levied, although such proceeding may be set aside or the judgment reversed.⁴

§ 1693. Judgments *inter partes* being generally rejected as evidence either for or against *strangers* to prove the facts adjudicated, a judgment in a criminal prosecution,—unless admissible as

¹ E. of Bedford v. Bp. of Exeter, 1616-17, Hob. 137; Rawlinson v. Oriel, 1688, 1 Show. 75; Henry v. Goldney, 1846, 15 L. J. Ex. 289 (Alderson, B.). Formerly this was done by a plea in abatement; but such pleas are now abolished; R.S.C. 1883, Ord. XXI. r. 20. The proper course would now appear to be to apply by summons to consolidate the actions or to stay the proceedings in one of them.

² Henry v. Goldney, 1846, 15 L. J. Ex. 289; overruling dictum (Ld. Ellenborough) in Boyce v. Douglas, 1807, 1 Camp. 60. In Newton v. Blunt, 1846, 16 L. J. C. P. 121, two actions having been brought against two joint-contractors in respect of the same demand, and the debt and

costs in one having been paid, it was held that a judge at chambers might stay the proceedings in the other without costs.

³ Phillips v. Ward, 1863, 2 H. & C. 717.

⁴ R. S. C. Ord. XLV. r. 7; 17 & 18 V. c. 125, § 65, which, although repealed generally, is still applicable to the County Courts by Order in Council of 18 Nov. 1867. See Cy. Ct. R. of 1903, Ord. XXVI. r. 11, and Randall v. Lithgow, 1884, 12 Q. B. D. 525. The same principle applies, even by common law, in the Mayor's Court: Westoby v. Day, 1853, 22 L. J. Q. B. 418. See, also, Matthey v. Wiseman, 1865, 34 L. J. C. P. 216.

§ 1693. evidence in the nature of reputation,¹ or, taken in conjunction with the prosecution, as an act of ownership,²—cannot be received in a civil action, to establish the truth of the facts on which it was rendered;³ and a judgment in a civil action, or an award,⁴ cannot be given in evidence for such a purpose in a criminal prosecution.⁵ Again, a verdict for or against a tenant for life will not be evidence for or against the reversioner, because the reversioner does not claim through the tenant for life, but enjoys an independent title.⁶ So, a judgment obtained by or against a lessee, cannot, it is submitted,—notwithstanding some authorities to the contrary,⁷—be made available in a subsequent action by or against the lessor.⁸ On the same principle, the record of the conviction of a principal cannot be received as any proof of his guilt on the trial of a subsequent indictment against the accessory.⁹ But where, on an indictment for receiving stolen goods, a witness for the Crown who had said that he was the principal and had stolen the goods, admitted on cross-examination that he had been acquitted of the theft, the Irish judges held, that his acquittal, though not conclusive, was a fact which it was right to leave to the jury, together with the fact of his subsequent statement in court.¹⁰

¹ See *Petrie v. Nuttall*, 1856, 25 L. J. Ex. 200; ante, § 624.

² *Brew v. Haren*, 1877, Ir. R. 11 C. L. 29.

³ *Smith v. Rummens*, 1807, 1 Camp. 9; *Hathaway v. Barrow*, 1807, 1 Camp. 151, both explained (*Parke, B.*) in *Blakemore v. Glamorganshire Can. Co.*, 1835, as reported 2 C. M. & R. 139; *Justice v. Gosling*, 1852, 21 L. J. C. P. 94; *Jones v. White*, 1717-18, 1 Str. 68; B. N. P. 233; *Hillyard v. Grantham*, cited (*Ld. Hardwicke*) in *Brownsword v. Edwards*, 1750, 2 Ves. sen. 246; *Gibson v. McCarty*, 1736, Cas. temp. Hardw. 311; *Helsham v. Blackwood*, 1851, 20 L. J. C. P. 187; *Wilkinson v. Gordon*, 1824, 2 Add. Ecc. 152; *Jameson v. Leitch*, 1842, Milw. Ecc. R. 690 (Ir.). See, also, 24 & 25 V. c. 96 ("The Larceny Act, 1861"), § 80, cited ante, § 1455.

⁴ *R. v. Fontaine Moreau*, 1848, 17 L. J. Q. B. 187.

⁵ See § 1680, supra, and *R. v.*

Duch. of Kingston, 1776, 20 How. St. Tr. 471, 485; *Acta facta in causâ civili non probant in causâ criminali*. *Masc. de Prob. Concl.* 34.

⁶ B. N. P. 232. See ante, §§ 757, 758.

⁷ *Com. Dig. Ev. A. 5*; 2 Ph. Ev. 13. The passage in *Comyn* seems to apply to the old action of *ejectione firmæ*.

⁸ *Wenman v. Mackenzie*, 1855, 25 L. J. Q. B. 44; *Rees v. Walters*, 1838, 7 L. J. Ex. 138; *Rushworth v. Countess of Pembroke*, 1668, Hardr. 472. See ante, § 789.

⁹ See *R. v. Turner*, 1832, 1 Moo. C. C. 347; *R. v. Ratcliffe*, 1832, 1 Lewin, C. C. 122; *Keable v. Payne*, 1838, 7 L. J. Q. B. 218; *R. v. Smith*, 1783, 1 Lea. C. C. 288; which do not, indeed, directly establish the proposition in the text. But its soundness is clear on principle, unless a conviction be a judgment in rem, which it is submitted it is not.

¹⁰ *R. v. McCue*, 1831, *Jebb, C. C.* 120 (Ir.).

§ 1694.¹ A record is, however, sometimes admitted in evidence, in favour of a stranger against one of the parties, as containing a *solemn admission* by such party in a judicial proceeding, with respect to a certain fact. But this is no real exception to the rule requiring mutuality, because, in such cases as these, the record is admitted, not as a judgment conclusively establishing the fact, but as the deliberate declaration or admission of the party himself that the fact was so. It is therefore to be treated according to the principles governing admissions, to which class of evidence it properly belongs.² Thus, in an action brought by the owner of lost goods against a carrier, the record in an action of trover previously brought by the same carrier against a person to whom he had misdelivered such goods, was held admissible, as amounting to a confession, by the carrier, in a court of record, that he had had the goods;³ and a record of judgment in a criminal case, upon a *plea of guilty*, is admissible in a civil action against the party, as a solemn judicial confession of the fact.⁴

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§ 1695. A judgment, to bind parties and privies, must have *directly decided the point* which is *in issue* in the *second action*;⁵ and therefore, whenever it is pleaded by way of estoppel, or is offered in evidence, the question of the identity of the question in issue in it, and in the then present cause of action, must be determined by the Judge, or, if the facts are disputed, by the jury, upon the evidence. For the purpose of determining it, not only may the pleading in the former action be looked at,⁶ but the actual words of the judgment may be proved by a shorthand note, verified by the affidavit,⁷ either of the shorthand writer who took it, or, where such person is dead, of some one employed in the suit who can verify the correctness of the note.⁸ This

¹ Gr. F. § 527 a, in part.
Ar. § 772, 783, 821.

² *Tiley v. Cowling*, 1701, 1 Ld. Raym. 744; *Robinson v. Swett*, 1825, 3 Greenl. 316 (Am.).

³ *Anon.*, 1808 (Wood, B.), cited 2 Ph. Ev. 29; *R. v. Fontaine Moreau*, 1848, 17 L. J. Q. B. 187; *Bradley v. Bradley*, 1834, 2 Fairf. 367 (Am.).

⁴ *Ricardo v. Garcias*, 1845, 12 Cl. & Fin. 368 (H. L.); *Bainbrigge v. Baddeley*, 1847, 2 Phillips, 705; *Toulmin v. Copland*, 1848, 2 Phillips,

711; *Hunter v. Stewart*, 1861, 31 L. J. Ch. 346; *Langmead v. Maple*, 1865, 18 C. B. N. S. 255; *Moss v. Anglo-Egyptian Navig. Co.*, 1865, L. R. 1 Ch. 108; *Dolphin v. Aylward*, 1864, 15 Ir. Ch. R. 583; *Flitters v. Allfrey*, 1874, L. R. 10 C. P. 29.

⁵ *Hunter v. Stewart*, 1861, 31 L. J. Ch. 346.

⁷ *Houston v. Marquis of Sligo*, 1885, 29 Ch. D. 448 (C. A.).

⁸ *De Mora v. Concha*, 1885, 29 Ch. D. 281 (C. A.).

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1696.

question of the identity of the subject-matter of the dispute in each of the two controversies, however, always requires careful consideration; but if the questions in dispute are really the same, on the one hand, it is not necessary that the actions should be in the same *form*,¹ and on the other hand, it is not sufficient that the *writs* should be *identical*, if the issues raised by the pleadings are different.

§ 1696.² Such being the broad rules, a recovery in an action for trespass against one who has wrongfully taken another's horse and sold it, and applied the money to his own use, is a bar to a subsequent action against the same person for the money received, or for the price, since the causes of action would be substantially the same;³ if two wrong-doers jointly convert goods to their own use by selling them, a judgment in trover recovered against one constitutes a bar to a subsequent action against the other for money had and received—and this, even though the proceeds of the sale exceeded the amount of the damages awarded in the first action;⁴ a verdict for the defendant in trover, on a plea denying the plaintiff's title to goods, is a bar to an action for the money arising from the sale of them, since here again, in both these actions, the same question of property must necessarily arise;⁵ the recovery of judgment in replevin is a bar to an action of trespass in respect of the same taking of the same goods—since, although the damages actually recovered in replevin are usually assessed at the cost of the replevin bond, no law exists to deprive the plaintiff of the right to recover special damages in that form of action;⁶ and a judgment in favour of a farmer in an action brought against him in the county court by a servant, for discharging such servant without reasonable cause, is

¹ *Krishna, &c. v. Brojeswari, &c.*, 1875, L. R. 2 Ind. App. 283 (P. C.). See, also, *Symons v. Rees*, 1876, 1 Ex. D. 416; *Priestman v. Thomas*, 1884, 9 P. D. 70 (C. A.).

² Gr. Ev. § 532, as to first five lines.

³ 17 Pick. 13 (Am.) (Putnam, J.); *Young v. Black*, 1813, 7 Cranch. 565 (Am.); *Livermore v. Herschell*, 1825, 3 Pick. 33 (Am.). Whether parol evidence would be admissible in such case to prove that the damages

awarded in trespass were given merely for the tortious taking, without including the value of the goods, to which no evidence has been offered, *quære*; and see *Loomis v. Green*, 1831, 7 Greenl. 386 (Am.).

⁴ *Buckland v. Johnson*, 1854, 23 L. J. C. P. 204.

⁵ *Hitchin v. Campbell*, 1771-2, 2 W. Bl. 827.

⁶ *Gibbs v. Cruikshank*, 1873, L. R. 8 C. P. 451.

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a bar to a subsequent summons before justices against him to there recover the servant's wages—and this though the jurisdiction of the two courts is totally distinct, and the claim made in the one be different from that preferred in the other.¹ An order taken by consent in a Chancery action for the delivery up of certain shares is a bar to a subsequent action for damages for their detention, for the damages might have been obtained in the Chancery action.² It is, however, doubtful whether in an action for mesne profits, in which the defendant relies on non-possession by the plaintiff, the latter may reply, by way of estoppel, a judgment for the recovery of land in his favour, obtained either by verdict or by default, and whether it has or has not been followed by the issue and execution of a writ of possession.³ On the principle that, where the question raised in a second action is substantially the same as that which was raised in a previous one, the parties are bound by the result of the first action; a finding in previous proceedings in the County Court that a tenancy is yearly, estops every party to such proceedings from subsequently asserting, in an action in the High Court, that such tenancy is weekly; ⁴ in an action of replevin, if those claiming the goods deny that they were tenants to the landlord, a verdict against them binds them to admit the tenancy in a subsequent action against them for rent of the same premises; ⁵ a finding upon an interpleader issue in a County Court that certain royalties on letters patent taken out by an undischarged bankrupt are personal earnings of the bankrupt prevents the trustee in bankruptcy from asserting in subsequent proceedings in the High Court that royalties that subsequently became due are not the bankrupt's personal earnings; ⁶ and, under the usury laws,⁷ a verdict of acquittal in an action for penalties for usury on the

¹ *Routledge v. Hislop*, 1860, 29 L. J. M. C. 90. But see *Hindley v. Haslam*, 1878, 3 Q. B. D. 481.

² *Serrao v. Noel*, 1885, 15 Q. B. D. 549.

³ See *Wilkinson v. Kirby*, 1854, 29 L. J. C. P. 224; and, also, *Pearse v. Coaker*, 1869, L. R. 4 Ex. 92; and *Kenna v. Nugent*, 1873, Ir. R. 7 C. L. 464, as to whether a judgment by default in ejectment is an estoppel, and, in an action for

mesne profits, is conclusive as to the time at which the plaintiff's title accrued. See, also, ante, § 1688.

⁴ *Flitters v. Allfrey*, 1874, 44 L. J. C. P. 73.

⁵ *Hancock v. Welsh*, 1816, 1 Stark. R. 347.

⁶ In *re Graydon*, [1896] 1 Q. B. 417.

⁷ Repealed by 17 & 18 V. c. 90, which came into operation 10th August, 1854.

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same bond, between the same parties, was evidence for the plaintiff on a defence alleging usury.¹ Moreover, a party who has either obtained a decree for a *divorce*, or whose suit for that purpose has been dismissed, cannot afterwards maintain a fresh suit for mere *judicial separation* on the same grounds.²

§ 1697. On the other hand, where the questions substantially in dispute in the two actions are not identical, the finding in the first action will have no effect on the second. Thus, the recovery of damages for injury to plaintiff's carriage through defendant's negligent driving, will not bar any second action claiming compensation for personal injuries caused by the same accident,—for the plaintiff, although he may have had an opportunity of recovering in the first action the damages claimed in the second, was not obliged to avail himself of it, but, in strict law, was entitled to discriminate between the damage done to his property, and that done to his person, and to treat each injury as a separate and distinct cause of action;³ the prior recovery of damages in an action for false imprisonment, cannot be pleaded in bar to a subsequent action for malicious prosecution, even where, on the first trial, the jury were wrongly directed to take into their consideration the malicious conduct of the defendant;⁴ a judgment recovered by a widow for compensation, *under Lord Campbell's Act*,⁵ for the death of her husband, will not be a bar to a subsequent action by her, *as his administratrix*, to recover damages from the same defendants for an injury caused by the same accident to his personal property;⁶ and where damage has been done by collision at sea, a proceeding in rem in the Admiralty Division will not be any bar to a proceeding in personam in the Queen's Bench Division.⁷ However, in an action for detention of goods a

¹ *Cleve v. Powel*, 1832, 1 M. & Rob. 228. For other examples, see *Whittaker v. Jackson*, 1864, 33 L. J. Ex. 181; *Newington v. Levy*, 1870, L. R. 6 C. P. 180.

² *Ciocci v. Ciocci*, 1860, 29 L. J. P. & M. 60. See *Green v. Green*, 1873, L. R. 3 P. & D. 121; and *Evans v. Evans and Robinson*, 1858, 27 L. J. P. 57.

³ *Brunsdon v. Humphrey*, 1884, 11 Q. B. D. 712 (C. A.).

⁴ *Guest v. Warren*, 1854, 23 L. J. Ex. 121.

⁵ 9 & 10 V. c. 93; 27 & 28 V. c. 95.

⁶ *Barnett v. Lucas*, 1872, Ir. R. 6 C. L. 247 (Ir. Ex. Ch.).

⁷ *Nelson v. Couch*, 1863, 15 C. B. N. S. 99; *The Bengal*, 1859, Swab. Adm. 468; *The John and Mary*, 1859, Swab. Adm. 471; *Harmer v. Bell*, 1851, 7 Moo. P. C. C. 267.

verdict for the defendant on a defence setting up an authorised sale, will not prevent him from being liable to the plaintiff for the proceeds of the sale in an action for money had and received;¹ in an action for obstructing a watercourse, where the plaintiff obtains a verdict on a defence denying the obstruction, the defendant is not thereby precluded from disputing the plaintiff's right to the watercourse in a second action;² and a tenant, sued for rent, who allows judgment to go by default, is not thereby estopped, in an action for subsequent rent, from pleading a defence, which, if pleaded in the first action, would have barred the then claim.³

§ 1698. On the same principle, if in an action for trespassing on a close, however described, the defendant states that the spot then in dispute is his own freehold, and obtains a verdict, this record will not estop the plaintiff from bringing a second action for a trespass committed on the same close, unless, indeed, it were proved (by the particulars or otherwise) that the trespasses alleged in each action were committed on the same spot; for otherwise, for all that appears, the defendant may not in the first action have proved his title to the *whole* close, but may have rested satisfied with showing that the *part* on which the trespass was committed belonged to him, so that the effect of the record in the first action in a subsequent action is only to prove that *some* part of the close was the defendant's property;⁴ and where a defendant was indicted for causing a *nuisance* by keeping furnaces, his former *summary conviction* by justices for an offence against a *Smoke Consumption Act*, committed at the same place and in the course of the same trade, was rejected, as the statutable offence was not, of necessity, the doing any act which would constitute an indictable nuisance at common law.⁵

§ 1699. A judgment is, however, conclusive *inter partes* irrespectively of whether the plaintiff in the second action was the plaintiff or defendant in the first, provided the *point in dispute* be the same

¹ *Hitchin v. Campbell*, 1771, 2 W. Bl. 779; as explained in *Buckland v. Johnson*, 1854, 23 L. J. C. P. 204.

² *Evelyn v. Haynes*, 1782 (Ld. Mansfield); cited and explained (Ld. Ellenborough) in *Outram v. Morewood*, 1803, 3 East, 346.

³ *Howlett v. Tarte*, 1861, 31 L. J.

C. P. 146. See another illustration, *Hall v. Levy*, 1875, L. R. 10 C. P. 154.

⁴ *Smith v. Royston*, 1841, 10 L. J. Ex. 437. See *Whittaker v. Jackson*, 1864, 33 L. J. Ex. 181.

⁵ *R. v. Fairie*, 1857, 8 E. & B. 486.

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1700.

in both suits. Therefore, a verdict negating any right which a defendant sets up in his defence, will estop him from asserting that right as plaintiff in a subsequent action against his former opponent; if, to an action for a breach of contract the defendant relies on a set-off or counterclaim, and the issue thereon is found against him, he cannot afterwards sue the plaintiff for the demand specified in that statement of defence;¹ and if in an action for goods sold and delivered with a warranty, or for work and labour done, or for goods supplied, under a contract, the defendant elect (as he may do) to show how much less the subject-matter of the action was worth, by reason of a breach of the warranty or contract, he will be considered as having recovered satisfaction for the breach, to the extent that he obtained, or was, after such election, capable of obtaining, an abatement of price on its account, and will to that extent (but no further) be precluded from recovering in another action.²

§ 1700. Care must, however, be taken to distinguish between cases where the points in issue are *identical*, and those where both suits *merely relate to the same transaction or property*. In the latter case the recovery of a verdict by the plaintiff in one action will not estop the defendant from bringing a subsequent action against him. Thus, if the purchaser of articles, on being sued for the stipulated price, pays it into court, and it is accepted in satisfaction of the cause of action, he is not estopped from suing the maker for damages (if otherwise recoverable) arising from the construction of the articles.³ He was not bound (though he might have done so) to claim these in the first action, and having omitted to do so, has a perfect right to maintain a separate action for the damage.⁴ Moreover, in running down cases, it frequently happens that both parties commence proceedings against each other; but a verdict on the first trial is not necessarily (it depends on the pleadings) evidence on the second,⁵ and it sometimes happens that different juries find verdicts in favour of both plaintiffs.⁶

¹ *Eastmure v. Laws*, 1839, 5 Bing. N. C. 444. See *Stanton v. Styles*, 1850, 19 L. J. Ex. 336.

² *Mondel v. Steel*, 1841, 10 L. J. Ex. 314. See *Thornton v. Place*, 1832, 1 M. & Rob. 218.

³ *Rigge v. Burbidge*, 1846, 15 L. J.

Ex. 309.

⁴ *Davis v. Hedges*, 1871, L. R. 6 Q. B. 687.

⁵ See *The Calypso*, 1856, Swab. Adm. 28.

⁶ In a case of collision, in the old Court of Admiralty, where cross

§ 1701. A convenient and safe *test* for ascertaining whether or not the judgment in one action should be a bar to another, is to consider *whether the same evidence would or would not sustain both*;¹ but if the statements of claim be framed in such a manner, that the causes of action *may* be identical in the two suits, the party bringing the second action must show that they are not the same, for he has no right to leave the question of identity to be determined on a nice investigation of the facts and pleadings.² Where a plaintiff has, in a previous action, omitted to press a part of his claim, but has done no act showing that he voluntarily, or even negligently, abandons it, he has sometimes, and under special circumstances, been allowed to, in a second action, both sue for and recover, the subject-matter of the claim which was not pressed on the former occasion, and on the merits of which, therefore, the court has pronounced no decision.³

§ 1702. On the other hand, it is a general rule, recognised in all courts alike, that, "where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring

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1702.

actions had been brought, Dr. Lushington,—after observing that the records of that court showed that scarcely ever was a case of collision tried in which a true statement of facts was made on both sides,—confessed that he was unable to come to any satisfactory decision on the conflict of evidence; and the *Trinity Masters* being equally incapable of coming to a conclusion, the result was that both actions were dismissed: *In re Maid of Auckland*, 1848, 6 Notes of Cases, Ecc. & Mar. 240. The general rule of the Admiralty Division in cases of collision, when both parties are blamable in not having taken necessary precautions, is to apportion the damages equally between them: *Vaux v. Sheffer*, 1852, 8 Moo. P. C. C. 75; *The Milan*, 1861, 31 L. J. Adm. 105; *The Sylph*, 1843-4, 2 Notes of Cases, Ecc. & Mar. 86; and see § 25, sub-s. 9 of the Judicature Act, 1873. This rule, however, does not apply when the collision has in part been caused by the plaintiffs' non-compliance with the regulations for preventing collision made under

"The Merchant Shipping Acts"; for by § 419, sub-s. 4, of "The Merchant Shipping Act, 1894" (57 & 58 V. c. 60), the plaintiff in such case cannot maintain his suit: *The James*, 1856. See ante, § 206; also, as to the present regulations, ante, § 1604, n.

¹ *Hitchin v. Campbell*, 1771-2, 2 W. Bl. 831; *Martin v. Kennedy*, 1800, 2 B. & P. 71; *Wadsworth v. Bentley*, 1854, 23 L. J. Q. B. 3; *Hunter v. Stewart*, 1861, 31 L. J. Ch. 346; *Dolphin v. Aylward*, 1864, 15 Ir. Ch. R. 583.

² *Ld. Bagot v. Williams*, 1824, 3 B. & C. 240; *Seddon v. Tutop*, 1796, 6 T. R. 609.

³ *Seddon v. Tutop*, 1796, 6 T. R. 609; recognised (*Bayley, J.*) in *Ld. Bagot v. Williams*, 1824, 3 B. & C. 240; and (*Best, C.J.*) in *Thorpe v. Cooper*, 1828, 5 Bing. 129; *Hadley v. Green*, 1832, 2 Tyr. 390. See, also, *Preston v. Peeke*, 1858, 27 L. J. Q. B. 424; cited ante, § 85. See acc. *Bridge v. Gray*, 1833, 14 Pick. 55 (Am.); *Webster v. Lee*, 1809, 5 Mass. 334 (Am.); *Phillips v. Berrick*, 1819, 16 Johns. 136.

**§§ 1702,
1703.**

forward their whole case, and will not, except under special circumstances, permit the same parties to open the same subject of litigation in respect of matter, which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case.¹ The plea of *res judicata* applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time."²

§ 1703. There are many cases in Chancery which illustrate the above rule.³ It is also illustrated by common law decisions to the effect that if a plaintiff obtains an interlocutory judgment for his whole claim, but afterwards, to avoid delay, on attending before the officer of the court has his damages assessed on one item only, and enters a *nolle prosequi* as to the others, this will bar any future action for the last-mentioned items—a *nolle prosequi* as to part, entered up after judgment for the whole, being equivalent to a *retraxit*;⁴ that if, on a reference of all matters in difference between two parties, one of them declines to bring before the arbitrator some claim which is included within the scope of the reference, he cannot make this claim the subject of a fresh action;⁵ that if a plaintiff, who has declared on several causes of action, fails to establish some of them at the trial for want of evidence, he cannot bring a second action to recover damages for these last, unless he either be nonsuited,⁶ or can induce the court, on the ground of mistake, surprise, or accident, to set aside the verdict he has obtained;⁷ and that if a plaintiff sue for part only of an indivisible

¹ See *Shoe Machinery Co. v. Cutlan*, [1896] 1 Ch. 667, 672.

² *Henderson v. Henderson*, 1843, 3 Hare, 115. See, also, *Srimut v. Katama*, 1866, 11 Moore, Ind. App. 50 (P. C.); and *Serrao v. Noel*, 1885, 15 Q. B. D. 549.

³ *Farquharson v. Seton*, 1828, 5 Russ. 45; *Partridge v. Osborne*, 1828, 5 Russ. 195; *Chamley v. Id. Dunsany*, 1807, 2 Sch. & Lef. 718 (Ir.);

M. of Breadalbane v. M. of Chancos, 1837, 7 L. J. Ch. 28.

⁴ *Bowden v. Horne*, 1831, 7 Bing. 716.

⁵ *Smith v. Johnson*, 1812, 15 East. 213; *Dunn v. Murray*, 1829, 4 M. & R. 571. See *Ravee v. Farmer*, 1791, 4 T. R. 146.

⁶ See post, § 1719.

⁷ *Stafford v. Clarke*, 1824, 2 Bing. 382.

claim it is a bar to his subsequently claiming the whole,¹ so that if one serves another for a year under an hiring, and then brings an action for a month's wages, or if a plaintiff, knowing that he has an unliquidated claim against a defendant for a large amount, chooses to sue him for a less sum than is due, or if, having a demand for 60*l.*, in three sums of 20*l.*, he consents at *Nisi Prius* to take a verdict for 40*l.*, a second action for the residue cannot afterwards be brought.² Upon the same principle in an action for damages for injury resulting from a tort the plaintiff may and should recover in respect of all damage arising from the cause of action sued on, whether present or prospective, and having recovered damages in one action he cannot recover in another for damages which have subsequently accrued from that cause of action;³ when however the damage itself constitutes the cause of action, and not the original act of the defendant per se, a fresh action may be brought in respect of subsequent damage as an injury arises.⁴

§§ 1703,
1704.

§ 1704. The County Court Act, 1888,⁵ contains an important clause relative to this subject; for it enacts, "it shall not be lawful for any plaintiff to divide any *cause of action* for the purpose of bringing two or more actions in any of the [County] Courts,⁶ but any plaintiff, having cause of action for more than " 100*l.*,⁷ "for which a plaint might be entered if not for more than " (now) 100*l.*, "may abandon the excess, and thereupon the plaintiff shall, on proving his case, recover to an amount not exceeding" (now) 100*l.*; "and the judgment of the court upon such plaint shall be in full discharge of all demands in respect of such cause of action, and entry of the judgment shall be made accordingly." The term "*cause of action*," here employed, is one of indefinite import; but

¹ *Miller v. Covert*, 1828, 1 Wend. 487.

² *Ld. Bagot v. Williams*, 1824, 3 B. & C. 235.

³ *Fetter v. Beale*, 1699, 1 Salk. 11 (Holt, C.J.); *Darley Main Colliery Co. v. Mitchell*, 1886, 11 A. C. 127.

⁴ *Darley Main Colliery Co. v. Mitchell*, *supra*.

⁵ 51 & 52 V. c. 43, § 81. The Act of 14 & 15 V. c. 57 ("The Civil Bill Courts (Ireland) Act, 1851"), which regulates the practice in Irish Civil

Bill Courts, contains similar provisions in § 36.

⁶ "These words do not, in terms, prohibit the splitting a demand, for the purpose of bringing one suit in the County Court, and another in the Superior Court" (Maule, J., in *Vines v. Arnold*, 1849. 8 C. B. 638). Such a course, would, however, probably be punished by the way the costs were dealt with.

⁷ County Court Act, 1903, formerly 50*l.*

§§ 1704,
1705.

the courts have fixed its meaning to a certain extent, by holding, first, that it is not limited to a cause of action on *one separate entire contract*, but that it extends to tradesmen's bills, where the dealing is intended to be continuous, and where the items are so far *connected* with each other, that if they be not paid, they form one entire demand;¹ and next, that it does not preclude the plaintiff from bringing distinct complaints, whenever the claims are of such a nature as would justify the introduction of two or more counts on the statement of claim, if the action were brought in the High Court.² In conformity with this last rule, a landlord has been allowed to sue his tenant in one complaint for rent, and in another for double value, in consequence of the premises being held over after the expiration of a notice to quit;³ and it appears that the holder of a promissory note, whereby the maker has specially undertaken to pay a particular rate of interest, may first sue for the interest, and afterwards recover the principal in a second action.⁴

§ 1705. The rule that for an adjudication in prior litigation to be conclusive, there must be an *identity* in the *points at issue*, in the first and second litigation, although there may be a *diversity in the forms* of proceeding, has hitherto been illustrated by referring to civil cases, where a judgment recovered in one action has, or has not, been regarded as a bar to a second action. The same rule, however, also prevails in *criminal prosecutions*. Here again, although, to warrant a prisoner in pleading *autrefois acquit*, or *autrefois convict*, the form of the two indictments, or even the nature of the charges need not be identical, yet, unless the first indictment were one upon which the prisoner might have been convicted by proof of the facts necessary to support the second indictment, an acquittal or conviction on the first trial will be no bar to the second.⁵ Thus, if a prisoner, indicted for burglariously breaking and entering a house, and stealing therein certain goods of A., be acquitted, he cannot plead this acquittal in bar of a subsequent indictment for burglariously

¹ In re Aykroyd, 1847, 17 L. J. Ex. 157.

² Wickham v. Lee, 1848, 18 L. J. Q. B. 21.

³ Id.

⁴ Morgan v. Rowlands, 1872, L. R. 7 Q. B. 493.

⁵ R. v. Gilmore, 1882, 15 Cox, C. C. 85.

breaking and entering the same house, and stealing the goods of B.;¹ a prisoner's acquittal on a charge of burglary and stealing will not avail him as a defence against an indictment for burglary with intent to steal;² if a prisoner be indicted³ for unlawfully uttering counterfeit coin after a previous conviction for a like offence, and acquitted of that felony, such acquittal cannot be pleaded in bar if he be afterwards indicted for the simple misdemeanor of uttering counterfeit coin.⁴

§§ 1705,
1706.

§ 1706. Further examples of the principle that a previous acquittal will not afford a defence unless the prisoner could, on his trial upon the first indictment, have lawfully been convicted of the offence with which he is charged by the second indictment, are as follow:—Upon an indictment for the statutable felony of administering poison with intent to murder, a previous acquittal on an indictment for murder, founded on the same facts, cannot be pleaded in bar;⁵ an acquittal upon a charge of murder is no bar to a subsequent charge of arson on the same facts,⁶ an acquittal upon an indictment for wounding with intent to kill, will not protect the accused from being subsequently indicted for murder upon the death of the person assaulted;⁷ a prisoner, who has been acquitted upon a charge of rape, may still, should the facts warrant such a course, be indicted either for an assault with *intent* to commit that crime,⁸ or for a common assault;⁹ but not for an attempt to commit rape for he might have been convicted of that upon the previous indictment;¹⁰ where two or more persons have committed successive rapes upon the same woman, though one of them be acquitted when charged as a principal in the first degree, he may still be indicted for being present aiding and abetting the others to commit the crime;¹¹

¹ Per Buller, J., delivering the opinion of all the judges in *R. v. Vandercomb*, 1796, 2 Lea. 716; and overruling *Turner's case*, 1664, Kel. 30; and *Jones and Beaver's case*, 1665, Kel. 52.

² *R. v. Vandercomb*, 1796, 2 Lea. 716.

³ Under "The Coinage Offences Act" (24 & 25 V. c. 99), § 12.

⁴ *R. v. Thomas*, 1875, 13 Cox, C. C. 52.

⁵ *R. v. Connell*, 1853, 6 Cox, C. C.

178.

⁶ *R. v. Serné*, 1888, 107 C. C. C. Sess. Pap., 418.

⁷ *R. v. De Salvi*, 1857, C. C. C. Sess. Pap., Vol. 46, p. 884, referred to in *R. v. Morris*, 1867, L. R. 1 C. C. R. 93.

⁸ *R. v. Gisson*, 1847, 2 C. & K. 781.

⁹ *R. v. Dungey*, 1864, 4 F. & F. 99.

¹⁰ 14 & 15 V. c. 100, § 9.

¹¹ See *R. v. Parry*, 1837, 7 C. & P. 836.

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and the acquittal or conviction, of a bankrupt upon an indictment for omitting certain goods out of his schedule, will be no bar to a second prosecution against him for omitting other goods, though as such a course of proceeding savours of oppression, it would under ordinary circumstances be discountenanced by the judge.¹ All these cases are merely illustrations of the ancient maxim of the common law, that no man shall be twice bought into jeopardy for the same crime.² It is immaterial whether the first acquittal were upon summary proceedings or indictment.³

§ 1707. Where, however, a prisoner might on the first indictment, even though the offence was a different one, have been lawfully convicted of the charge made against him by the second, an acquittal on the first indictment affords a defence against the second. Thus, an acquittal on an indictment charging the prisoner as a principal felon, will now⁴ be a bar to an indictment against him as an accessory before the fact, because,⁵ "whosoever shall become an accessory before the fact to any felony, whether the same be a felony at common law, or by virtue of any Act passed or to be passed, may be indicted, tried, convicted, and punished in all respects as if he were a principal felon;" a person tried for any misdemeanor is not liable, unless the jury have been discharged from giving a verdict, to be afterwards prosecuted for felony on the same facts,⁶ because, as stated in a former section,⁷ he may be convicted of the misdemeanor, though a felony be proved; a person tried for obtaining by any false pretence any chattel, money, or valuable security, is, for a similar reason, not liable to be afterwards prosecuted for larceny upon the same facts;⁸ a person tried for embezzlement, or fraudu-

¹ *R. v. Champneys*, 1837, 2 M. & Rob. 26.

² See *R. v. Murphy*, 1859, 28 L. J. C. P. 53; 2 Hawks. c. 35.

³ *Wemyss v. Hopkins*, 1875, L. R. 10 Q. B. 378; *R. v. Miles*, 1890, 24 Q. B. D. 423.

⁴ The law was formerly otherwise. See *R. v. Plant*, 1836, 7 C. & P. 575.

⁵ Under 24 & 25 V. c. 94 ("The Accessories and Abettors Act, 1861"), § 1.

⁶ 14 & 15 V. c. 100 ("The Criminal Procedure Act, 1851"), § 12.

⁷ Ante, § 1705, ad fin.

⁸ 24 & 25 V. c. 96 ("The Larceny Act, 1861"), § 88; *R. v. King*, 1897, 1 Q. B. 214. But it has been held on the words of the statute that an acquittal upon an indictment for larceny is no bar to a subsequent indictment on the same facts for false pretences: *R. v. Henderson*, 1841, C. & Mar. 328.

lent application or disposition, as a clerk or servant or as a person employed in either of those capacities, or as a person employed in the public service, or in the police, or as a partner, or a joint beneficial owner,¹ cannot be afterwards indicted for larceny upon the same facts; and no person tried for larceny is liable to a second prosecution for embezzlement, or for fraudulent application or disposition.²

§ 1708. On principles similar to those which we have just been considering, a man who has been indicted for a compound crime, and wholly acquitted, cannot be afterwards indicted for any minor offence identical with one which was included in such crime, of which, though acquitted of the more serious charge, he might have been found guilty on such indictment.³ For instance, one who has been acquitted on an indictment for murder, is protected against a second prosecution for manslaughter;⁴ if a party charged with any felony or misdemeanor be wholly acquitted, he cannot be subsequently indicted for an attempt to commit the same crime, since the jury may now, on the first indictment, acquit of the felony or misdemeanor therein charged, and, if the evidence shall warrant such finding, find a verdict of guilty of the attempt;⁵ an acquittal on a charge of administering poison, so as to endanger life, or to inflict grievous bodily harm, is a bar to an indictment for administering poison, with intent to injure, aggrieve, or annoy any one;⁶ an acquittal of a person on an indictment for robbery, for stealing in a dwelling-house, for burglary in breaking into a house and stealing goods, for larceny as a servant,⁷ or for stealing from the person, will be a bar to a subsequent indictment against him for

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¹ 30 & 31 V. c. 116, § 1; *R. v. Rudge*, 1874, 13 Cox, C. C. 17.

² 24 & 25 V. c. 96 ("The Larceny Act, 1861"), § 72. For other illustrations of this rule, see "The Corrupt and Illegal Practices Prevention Act, 1883" (46 & 47 V. c. 51), § 52.

³ But the offence must be the same; consequently, if a man be acquitted of a burglary in which it is laid that he intended to steal the goods of *A. and B.* (i.e., their joint property), he may be subsequently indicted for stealing the goods of *A.* See 2 Hale,

P. C. 302.

⁴ 2 Hale, 246.

⁵ 14 & 15 V. c. 100 ("The Criminal Procedure Act, 1851"), § 9, cited ante, § 269. See, also, 14 & 15 V. c. 19 ("The Prevention of Offences Act, 1851"), § 5; also *R. v. Miller*, 1879, 14 Cox, C. C. 356.

⁶ 24 & 25 V. c. 100, § 25.

⁷ *R. v. Jennings*, 1858, 7 Cox, C. C. 397.

⁸ See 1 Russ. C. & M. 837, 838, n., by Mr. Greaves. See *R. v. Compton*, 1828, 3 C. & P. 418.

**§§ 1708,
1709.**

the simple larceny;⁸ and a man who has been tried for robbery, and acquitted, will be protected from a second prosecution for assaulting with intent to rob.¹

§ 1709. The rule that a previous acquittal on a charge of a composite crime is a defence to any subsequent indictment, for a crime of which the prisoner might have lawfully been convicted on the first indictment, also holds good in the converse case—that is, when an accused has been convicted of an offence which, though a less serious one, forms an essential ingredient in a graver offence with which he is subsequently charged. Thus: all *killing* of a human being is in itself felonious. To kill another by *negligence* is manslaughter; to kill another of “malice aforethought” is murder; but in both cases the *killing* is a necessary ingredient of the offence. Therefore, if a prisoner be acquitted or convicted of manslaughter, or of simple larceny, he cannot be afterwards indicted for the murder of the same person,² or for compound larceny with respect to the same property.³ Whether a person accused of a lesser offence is acquitted or convicted, he may not be afterwards charged with a more aggravated offence upon the same facts,⁴ but where a person has been acquitted or convicted of assault, he may be charged subsequently with murder or manslaughter should the party assaulted die, as the death affords a fresh fact for the accused to answer.⁵ If a bill be preferred for one offence, and the evidence prove a greater, the judge should not direct the jury to acquit, but should discharge the jury of that indictment, and order a fresh one to be preferred.⁶ An acquittal by a competent jurisdiction abroad is a bar to an indictment for the same offence before any other tribunal.⁷ In such a case the defendant should produce an exemplification of the record of his acquittal under the public seal of that state or kingdom where he has been tried and acquitted.⁸

¹ 24 & 25 V. c. 96 (“The Larceny Act, 1861”), § 41. See *R. v. Mitchell*, 1852, 21 L. J. M. C. 135.

² 2 Hale, 246; *Holtcroft's case*, 1577-8; *Fost. C. L.* 326. See *R. v. Tancock*, 1876, 13 Cox, C. C. 217.

³ *R. v. Berigan*, 1841, Ir. Cir. R. 177 (*Crampton, J.*).

⁴ *R. v. Elrington*, 1861, 1 B. & S.

688; *R. v. Miles*, 1890, 24 Q. B. D. 423.

⁵ *R. v. Morris*, 1867, L. R. 1 C. C. R. 90; *R. v. Salvi*, 1857, 10 Cox, C. C. 481, n.

⁶ See *Fost. C. L.* 327, 328.

⁷ *R. v. Roche*, 1775, 1 Leach. 134; *R. v. Hutchinson*, 1678, 3 Keb. 785.

⁸ *Beak v. Tyrrwhit*, 1688, 3 Mod.

§ 1710.

§ 1710. The doctrine embodied in the above rules has been recognised and adopted by the Legislature on several occasions. For instance, a summary conviction in respect of *any offence* thus punishable under the Acts of 1861, respectively relating to larcenies, and to malicious injuries to property;¹ or under the Seamen's Clothing Act, 1869,² is a bar to any other proceeding for the same cause; a person who has been convicted of a common assault on a married woman and has paid the penalty imposed, cannot afterwards be sued by the husband of the woman for the loss which he, as such husband, has sustained by the assault on his wife;³ if a magistrate, on hearing a summons against a cabman for furious driving, award compensation to the party aggrieved, such party is barred by such award from bringing any subsequent action in respect of any injury sustained by him, either against the cabman or his employer, unless, indeed, he had, from the first, refused to submit himself to the magistrate's jurisdiction;⁴ and a person, who has been charged before justices with a common assault, or with an aggravated assault on a woman or child, and has obtained either a certificate of dismissal, or been summarily convicted, is released "from all further or other proceedings, civil or criminal, for the same cause."⁵ A divided court has, however, determined that, in spite of this latter Act, a summary conviction for assault is no bar to an indictment for murder or manslaughter, when the party assaulted has subsequently died from the effects of the blows.⁶ On the other hand, a man who has been either acquitted or convicted before justices of an assault, cannot afterwards be indicted for felonious wounding in the same transaction.⁷ A

194; *R. v. Roche*, 1775, 1 Leach. 134.

¹ 24 & 25 V. c. 96 ("The Larceny Act, 1861"), § 109; 24 & 25 V. c. 97 ("The Malicious Damage Act, 1861"), § 67.

² 32 & 33 V. c. 57, § 6.

³ *Masper v. Brown*, 1875, 1 C. P. D. 97.

⁴ *Wright v. Lond. Omnibus Co.*, 1877, 2 Q. B. D. 271; 6 & 7 V. c. 86 ("The London Hackney Carriages Act, 1843"), § 28.

⁵ 24 & 25 V. c. 100 ("The Offences against the Person Act, 1861"), § 45.

The word "cause" here used is sufficiently ambiguous, as it may mean either "act" or "charge," and its legal effect will materially vary according to which of these two interpretations shall prevail. See, also, ante, § 1616.

⁶ *R. v. Morris*, 1867, L. R. 1 C. C. R. 93 (*Martin, B., and Byles, Keating, and Shee, J.J.; Kelly, C.B., diss.*).

⁷ *R. v. Walker*, 1843, 2 M. & Rob. 357; *R. v. Stanton*, 1851, 5 Cox, C. C. 324; *R. v. Ebrington*, 1862, 31 L. J. M. C. 14. See, also, *Wemyss v.*

§§ 1710— conviction, to satisfy this statute, must be followed by fine or
 1711. imprisonment, and be proved by the record or an examined
 copy.¹

§ 1710A. Various statutory provisions also exist dealing with the effect of prior indictments; thus, The Piracy Act, 1744,² provides that persons tried and acquitted or convicted for piracy shall not be liable to be tried again "for the same fact" for high treason. The incitement to Mutiny Act,³ contains a similar proviso, so do the Unlawful Oaths Acts,⁴ and the Treason Felony Act.⁵ The Criminal Law Procedure Act, 1851,⁶ provides that a person tried for misdemeanor shall not be entitled to acquittal, because the evidence proves a felony, and shall not be tried again on the same facts for felony unless the court so directs. The same Act, while permitting convictions of an attempt on a charge for the full offence, forbids a second trial for the attempt.⁷ By the Larceny Act similar provisions are made as to trials for false pretences where the evidence proves larceny.⁸ By the Interpretation Act, 1899,⁹ where an act or omission constitutes an offence under two or more Acts, or under an Act and at common law, the offender shall, unless the contrary intention appears, be liable to be prosecuted or punished under either or any of those Acts, or at common law, but shall not be liable to be punished twice for the same offence.

§ 1711. The distinction which exists between the admissibility and effect of judgments in rem and of judgments inter partes having now been pointed out, it will be expedient to refer shortly to some rules which equally govern them both. And first, it is an unquestionable rule of law, that neither a judgment in rem, nor a judgment inter partes, is *evidence of any matter which may or may not have been controverted*, or which came *collaterally* in question or which was *incidentally cognizable*, or which can only be *inferred by argument* from the judgment.¹⁰ For instance, on

Hopkins, 1875, L. R. 10 Q. B. 378.

¹ Hartley v. Hindmarsh, 1866, L. R. 1 C. P. 553.

² 18 G. 2, c. 30.

³ 37 G. 3, c. 70, § 2.

⁴ 37 G. 3, c. 123, § 7; and 52 G. 3, c. 104, § 8.

⁵ 11 & 12 V. c. 12, § 7.

⁶ 14 & 15 V. c. 100, § 12.

⁷ 14 & 15 V. c. 101, § 9.

⁸ 24 & 25 V. c. 96, § 88.

⁹ 52 & 53 V. c. 63.

¹⁰ R. v. Duch. of Kingston, 1776.

20 How. St. Tr. 538. See R. v. Hutchins, 1880, 6 Q. B. D. 300 (C. A.).

an appeal against an order of removal, where the respondents relied on a derivative settlement from the pauper's father, they were not allowed to put in a previous order for the removal of the pauper's brother to the appellant parish, together with the examinations on which it was founded, though these examinations clearly proved that the brother's settlement was derived from the father;¹ the actual order for removing the brother being silent as to the ground of removal, and the examinations being no part of the record.²

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1712.

§ 1712. Further examples of the same principle are, that where in an action of trover against a woman's administrator by a man who claimed to be her widower, the defendant relied on the letters of administration, insisting that they could only have been granted to him upon the supposition that the plaintiff and the intestate had never been married, it was held that it could not be inferred from the grant of administration, that the parties were unmarried;³ the probate of a will, purporting to have been made by a married woman in pursuance of a power, furnishes no evidence whatever that the power has been duly executed—the Probate Division having simply to determine on the validity of the instrument as an ordinary will of an ordinary person, and to grant probate of it in case no valid objection can be taken to it, when regarded in this light,—leaving the question whether or not the power has been duly executed to be decided by the Chancery Division;⁴ and where—before usury was legalised⁵—a defendant had, on being sued upon a bond, pleaded that the bond was given in pursuance of a usurious agreement between the plaintiff and himself, and had succeeded in that action in establishing the defence, the plaintiff was not estopped, in a subsequent action on a collateral security for the same debt, from disproving the usurious agreement, inasmuch as the existence of

¹ *R. v. Sow*, 1843, 4 Q. B. 93; *R. v. Knaptoft*, 1824, 2 B. & C. 883; explained in *R. v. Hartington*, 1855, 4 E. & B. 780.

² 4 Q. B. 98 (1843). See ante, § 809, ad fin.

³ *Blackham's case*, 1708, 1 Salk. 290; cited and explained (*Ld. Lyndhurst*) in *Barrs v. Jackson*, 1845, 1 Phill. 588.

⁴ *Barnes v. Vincent*, 1846, 5 Moo. P. C. C. 201; *Chatelain v. Pontigny*, 1859, 1 Swab. & Trist. 411; *Parkinson v. Townsend*, 1875, 44 L. J. P. & M. 72. See *Ward v. Ward*, 1848, 11 Beav. 377; *Noble v. Phelps and Willock*, 1871, L. R. 2 P. & D. 276.

⁵ By 17 & 18 V. c. 90.

§§ 1712—1714.—such agreement had not been directly in issue in the action on the bond.¹

§ 1713. Wherever a judgment is offered in evidence against a *stranger*, he may avoid its effects, by furnishing distinct proof that it was obtained by *fraud* or *collusion*. To borrow the language of Lord Chief Justice De Grey, "Fraud is an extrinsic, collateral act, which vitiates the most solemn proceedings of courts of justice. Lord Coke says, it avoids all judicial acts, ecclesiastical or temporal."² In applying this rule, it matters not whether the judgment impugned has been pronounced by an inferior tribunal, or by the highest court of judicature in the realm; but in all cases alike it is competent for every court, whether superior or inferior, to treat as a nullity any judgment which can be clearly shown to have been obtained by manifest fraud.³ *Fabula*, non *judicium*, hoc est; in *scenâ*, non in *foro*, res agitur.⁴ Whether an *innocent party* would be allowed to prove in one court that a judgment against him in another court was obtained by fraud, is a question not equally clear, as it would be in *his* power to apply directly to the court which pronounced the judgment to vacate it;⁵ but, however this point may be ultimately determined, thus much is evident, that a *guilty party* would not be permitted to defeat a judgment, by showing that, in obtaining it, he had practised an imposition on the court; for it would be an outrage to justice and common sense, if a person could thus avoid the consequences of his own fraudulent conduct.⁶

§ 1714. Again, every species of judgment will be rendered inadmissible in evidence, on proof being given that the court

¹ *Carter v. James*, 1844, 13 L. J. Ex. 373.

² *R. v. Duch. of Kingston*, 1776, 20 How. St. Tr. 544; *Brownsword v. Edwards*, 1750-1, 2 Ves. Sen. 246; *Philipson v. Ld. Egremont*, 1844, 14 L. J. Q. B. 25; *Meddowcroft v. Huguenin*, 1844, 4 Moo. P. C. C. 386; *Perry v. Meddowcroft*, 1846, 10 Beav. 122; *Harrison v. Corp. of Southampton*, 1853, 22 L. J. Ch. 722; *Ochsenbein v. Papelier*, 1873, L. R. 8 Ch. 695.

³ *Shedden v. Patrick*, 1854, 1 Macq. 535 (H. L.). See *Eyre v. Smith*, 1877, 2 C. P. D. 435 (C. A.).

⁴ *Per Wedderburn, S.-G.*, in *R. v. Duch. of Kingston*, 1776, 20 How. St. Tr. 479; cited (*Ld. Cranworth*) in *Shedden v. Patrick*, 1854, 1 Macq. 535 (H. L.).

⁵ *Prudham v. Phillips*, 1737-8, 2 Ambl. 763; *R. v. Duch. of Kingston*, 1776, 20 How. St. Tr. 544; *Shedden v. Patrick*, 1854, 1 Macq. 535 (H. L.). See *Ex parte White*, *White v. Tommey*, 1853, 4 H. L. C. 313.

⁶ *Prudham v. Phillips*, 1737-8, 2 Ambl. 763. See *Doe v. Roberts*, 1819, 2 B. & Ald. 367; *Bessey v. Windham*, 1844, 14 L. J. Q. B. 7.

which pronounced it had no *jurisdiction*.¹ For instance, a probate or administration might formerly have been defeated by showing that the metropolitan, and not the ordinary who purported to do so, had jurisdiction to grant it,² though it cannot now be defeated on this ground.³ But it may still be defeated by proving that the supposed testator or intestate is alive, since, in this event, the Probate Division can have had no jurisdiction, nor its sentence any effect;⁴ and if a prisoner be tried before Quarter Sessions, on a day to which the court was not duly adjourned,⁵ or for an offence which the justices or recorders are by statute restrained from trying,⁶ his acquittal or conviction

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¹ *R. v. Bp. of Chester*, 1747-8, 1 W. Bl. 25 (Lee, C.J.), as to sentences of visitors; *R. v. Washbrook*, 1825, 4 B. & C. 732, as to awards by public commissioners; *Mann v. Owen*, 1829, 4 B. & C. 732, as to sentences of courts-martial. See, also, *Briscoe v. Stephens*, 1824, 2 Bing. 213; *Abp. of Dublin v. Ld. Trimleston*, 1849, 12 Ir. Eq. R. 251; and *Linnell v. Gunn*, 1867, L. R. 1 A. & E. 363.

² *Marriot v. Marriot*, 1725-6, 1 Str. 671; *Stokes v. Bate*, 1826, 5 B. & C. 491. See, also, *Huthwaite v. Phaire*, 1840, 1 M. & Gr. 159; *Whyte v. Rose*, 1842, 3 Q. B. 495; *Easton v. Carter*, 1850, 19 L. J. Ex. 173.

³ 20 & 21 V. c. 77 ("The Court of Probate Act, 1857"), § 86; 20 & 21 V. c. 79, § 91, Ir.

⁴ *Allen v. Dundas*, 1789, 3 T. R. 129.

⁵ *R. v. Bowman*, 1834, 6 C. & P. 342.

⁶ The Act 5 & 6 V. c. 38, gives a list of offences not triable at quarter sessions. In the following list that enactment must, unless some other statute is specifically mentioned, be taken to be that containing the prohibition against trying at quarter sessions, even if no express mention of it be made (as has in cases falling under it for the most part been done). Moreover, in construing 5 & 6 V. c. 38, it must be remembered that, although the Act speaks of "transportation for life," and at the time when it was passed (1842) many offences were punishable by

such transportation, some fifteen years later, penal servitude was (by "The Penal Servitude Act, 1857" (20 & 21 V. c. 3), amended by 55 & 56 V. c. 19 ("The Statute Law Revision Act, 1892")) substituted for transportation. The offences not triable at quarter sessions are the following:—*Abduction* of women and girls (5 & 6 V. c. 38). *Abortion*.—Administering drugs or using instruments to procure miscarriage (24 & 25 V. c. 100 ("The Offences against the Person Act, 1861"), § 58). *Agents, frauds by*, see *Frauds*. *Arson*.—Unlawfully and maliciously setting fire to any place of divine worship (24 & 25 V. c. 97 ("The Malicious Damage Act, 1861"), § 1); or to any dwelling-house, any person being therein (id. § 2); or to any house, stable, outhouse, shop, &c., with intent to injure or defraud any person (id. § 3); or to any building belonging to any railway, dock, harbour, or canal (id. § 4); or to any public building (id. § 5); or to any stacks of corn, coal, wood, &c. (id. § 17); or to any coal mine (id. § 26); or to any ship (id. § 42); or to the same with intent to prejudice the owner or underwriters (id. § 43); or to crops of corn, grain, or pulse, or to any part of a wood, coppice, or plantation of trees, or to any heath, gorse, furze, or fern (5 & 6 V. c. 38); burning or otherwise destroying ships of war, dockyards, arsenals, military or naval stores, &c. (12 G. 3, c. 24 ("The Dockyards, &c. Protection Act, 1772")). *Assault*.—Attempting

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to choke, &c., in order to commit any indictable offence (24 & 25 V. c. 100 ("The Offences against the Person Act, 1861"), § 21; using or attempting to use chloroform, &c., to commit any indictable offence (id. § 22); unlawfully wounding, or shooting or attempting to shoot any person with intent to do grievous bodily harm or prevent lawful arrest (id. § 18). *Bankers*, frauds by, see *Frauds*. *Bigamy* and offences against the laws relating to marriage (5 & 6 V. c. 38). *Blasphemy* and offences against religion (id.). *Bribery* (id.); corrupt practices within the meaning of "The Corrupt and Illegal Practices Prevention Act, 1883" (46 & 47 V. c. 51), § 3, not triable at quarter sessions under id. § 53, and "The Corrupt Practices Prevention Act, 1854" (17 & 18 V. c. 102), § 10. *Breaking and Entering* or breaking out of a church or chapel and committing any felony (24 & 25 V. c. 96 ("The Larceny Act, 1861"), § 50). *Coin*.—*Counterfeiting* gold or silver current coin (24 & 25 V. c. 99 ("The Coinage Offences Act, 1861"), § 2); colouring coin or metal with intent to make them pass for gold or silver coin, or for a higher coin (id. § 3); buying or selling, &c., counterfeit gold or silver coin for lower value than its denomination (id. § 6); importing counterfeit coin from beyond the seas (id. § 7); making, mending, or having possession of any coining tools (id. § 24); and conveying tools or moneys out of the Mint without authority (id. § 25). *Combinations and Conspiracies*, unlawful, except conspiracies or combinations to commit any offence, which the justices or recorder respectively have or has jurisdiction to try when committed by one person (5 & 6 V. c. 38). *Concealment of Birth* (id.). *Directors*, frauds by, see *Frauds*. *Embezzlement* by officers of the Bank of England or Ireland (24 & 25 V. c. 96 ("The Larceny Act, 1861"), § 73). *Escape*.—Rescuing murderers (4 G. 2, c. 37, § 9; 7 W. 4 & 1 V. c. 91); assisting escape of prisoners of war (56 G. 3, c. 156). *Explosives*.—Causing bodily injury by explosion (24 & 25 V. c. 100 ("The Offences against the Person Act, 1861"), § 28); causing gun-

powder to explode, or sending to any person any explosive substance, or throwing at any person any corrosive or explosive substance with intent to do grievous bodily harm (id. § 29); destroying, &c., house or building by gunpowder, &c., so as to endanger life (24 & 25 V. c. 97 ("The Malicious Damage Act, 1861"), § 9); causing explosion likely to endanger life or property (46 V. c. 3 ("The Explosive Substances Act, 1883"), § 2). *Extortion*.—Letter demanding money, &c., with menaces (24 & 25 V. c. 96 ("The Larceny Act, 1861"), § 44); sending letter threatening to accuse, or accusing or threatening to accuse, of crime, with intent to extort (id. §§ 46, 47); inducing person by violence or threats to execute deeds, &c., with intent to defraud (id. § 48). *Factors*, frauds by, see *Frauds*. *Firing dwelling-houses*, &c., see *Arson*. *Forgery* (5 & 6 V. c. 38). *Frauds* by agents, bankers, directors, factors, trustees, &c., under §§ 75–86 of "The Larceny Act, 1861" (24 & 25 V. c. 96); not triable at quarter sessions under id. § 87. *King*.—Offences against the King's title, prerogative, person, or government (id.). *Libel*.—Composing, printing, or publishing blasphemous, seditious, or defamatory libels (5 & 6 V. c. 38). *Malicious Injury*.—Destroying goods in process of manufacture, certain machinery, &c. (24 & 25 V. c. 97 ("The Malicious Damage Act, 1861"), § 14); destroying any sea or river bank, &c. (id. § 30); injuries to bridges (id. § 33). *Manslaughter* (24 & 25 V. c. 100 ("The Offences against the Person Act, 1861"), § 5). *Murder* (5 & 6 V. c. 38); attempts to murder (24 & 25 V. c. 100 ("The Offences against the Person Act, 1861") §§ 11–15). *Mutiny*, inciting to (37 G. 3, c. 70, § 1); as to the punishment, see 7 W. 4 and 1 V. c. 91, § 52. *Oaths*.—Administering or taking unlawful oaths (5 & 6 V. c. 38). *Parliament*.—Offences against either House of Parliament (id.). *Perjury* or subornation of perjury (id.); making or suborning any other person to make a false oath, affirmation, or declaration, punishable as perjury or as a misdemeanour (id.). *Personation*.—Falsely personating

would be no bar to a future indictment for the same offence, because accused never stood in peril upon the former proceedings, which were a mere nullity. §§ 1714, 1715.

§ 1715. Questions of jurisdiction most frequently arise with regard to summary convictions by magistrates, orders of justices, inquisitions found by sheriffs' juries, and other judicial proceedings of inferior tribunals; and here,—although, as already explained,¹ an adjudication of this kind cannot be impeached by disproving the facts stated in it, not excepting those which are necessary to give jurisdiction,—yet still, the parties against

any person, or the heir, executor, administrator, wife, widow, next of kin, or relation of any person, with intent fraudulently to obtain any property (37 & 38 V. c. 36 ("The False Personation Act, 1874")); not triable at quarter sessions (id. § 3), except in cases within 44 & 45 V. c. 58 ("The Army Act, 1881"), § 142, sub-a. 3. *Piracy*.—This offence is created by 11 & 12 W. 3, c. 7, §§ 8—10; 8 G. 1, c. 24, § 1; 18 G. 2, c. 30; and 7 W. 4 and 1 V. c. 88 ("The Piracy Act, 1837"), § 2; as to punishment (id. §§ 2, 3); piratical slave trading (5 G. 4, c. 113 ("The Slave Trade Act, 1824"), § 9), and is not triable at quarter sessions. *Poaching*.—Three or more persons entering land by night to take game, being armed (9 G. 4, c. 69 ("The Night Poaching Act, 1828"), § 9); not triable at quarter sessions (id.). *Post Office*.—Stealing post letter-bags, or stealing post letters from post letter-bags, or post offices, or from a mail, or stealing any chattels, money, or valuable securities from or out of a post letter, or stopping a mail with intent to rob or search the same (7 W. 4 & 1 V. c. 36 ("The Post Office (Offences) Act, 1837"), §§ 27, 28, 41, 42). *Præmunire*.—Offences subject to the penalties of præmunire (5 & 6 V. c. 38). *Railways*.—Acts done with intent to obstruct or injure any engine, &c., using railway (24 & 25 V. c. 97 ("The Malicious Damage Act, 1861"), § 35); acts done with intent to injure passengers (24 & 25 V. c. 100 ("The Offences against the Person Act, 1861"), §§ 32, 33). *Rape*

(id. § 48); defilement of girls under age of thirteen years (48 & 49 V. c. 69 ("The Criminal Law Amendment Act, 1885"), § 4). *Records*.—Stealing or fraudulently taking or injuring or destroying records or documents belonging to any court of law or equity, or relating to any proceeding therein (5 & 6 V. c. 38). *Riot*.—Preventing reading of proclamation, and continuing to riot after proclamation (1 G. 1, st. 2, c. 5 ("The Riot Act"), §§ 1, 5); riotous demolition of houses, &c. (24 & 25 V. c. 97 ("The Malicious Damage Act, 1861"), § 11). *Robbery* or assault with intent to rob by a person armed, or by two or more, or robbery with violence (24 & 25 V. c. 96 ("The Larceny Act, 1861"), § 43). *Ship*.—Burning, casting away, or otherwise destroying any ship (24 & 25 V. c. 97 ("The Malicious Damage Act, 1861"), §§ 42, 43); acts tending to immediate loss or destruction of any ship (id. § 47). *Sodomy* (24 & 25 V. c. 100 ("The Offences against the Person Act, 1861"), § 61). *Solicitors*, frauds by, see *Frauds*. *Title Deeds*.—Stealing or fraudulently destroying any document or written instrument being or containing evidence of the title to any real estate or any interest in lands, tenements, or hereditaments (5 & 6 V. c. 38). *Treason* (id.); misprision of treason (id.); treasonable felonies (11 V. c. 12). *Trustees*, frauds by, see *Frauds*. *Wills*.—Stealing or fraudulently destroying any wills or testamentary papers (5 & 6 V. c. 38).

¹ Ante, §§ 1669—1672.

**§§ 1715,
1716.**

whom it is offered in evidence may establish its invalidity, either by proving any extrinsic facts, which show that the person or court pronouncing it had no authority *to enter into the inquiry*,¹ or by pointing out the circumstance that the adjudication itself does not disclose facts sufficient to give jurisdiction.² Thus, the fact that they have done so may be shown by evidence, but the order will be bad if justices have acted in a matter not regularly before them, as if, for example, they have proceeded to remove a pauper without any complaint being made by the parish officers.³ Where, too, a justice had convicted a baker by four separate convictions of selling bread upon the same Sunday, in an action for trespass subsequently brought against the justice in consequence, it was held that he could not rely upon the convictions as a defence, since he had exceeded his authority in imposing more than one penalty for the same day, and, therefore, three of the convictions were of necessity void.⁴ Every order made in pursuance of a statutory authority must contain, on the face of it, a statement of all facts which are requisite to show jurisdiction, and this whether the order be made by a magistrate or by the Lord Chancellor.⁵

§ 1716. The judicial proceedings of inferior tribunals have been quashed or otherwise treated as nullities, because they did not set forth sufficient facts to found jurisdiction in, amongst others, the following cases:—Where justices had jurisdiction only if the servant was a servant in husbandry, an order of justices discharging a servant from her service was held bad, because it did not state that she was a servant in husbandry;⁶ convictions have been quashed⁷ for not showing that the justices

¹ *R. v. Bolton*, 1841, 1 Q. B. 74; *R. v. Somersetshire JJ.*, 1826, 5 B. & C. 816; cited in *In re Clarke*, 1842, 11 L. J. Q. B. 75.

² *In re Clarke*, 1842, 11 L. J. Q. B. 75 (Patteson, J.); ante, § 147. See *Ayrton v. Abbott*, 1849, 18 L. J. Q. B. 314; *Branwell v. Penneck*, 1827, 7 B. & C. 536; *Ex parte Bailey and Ex parte Collier*, 1854, 23 L. J. M. C. 161; *R. v. St. George, Bloomsbury*, 1855, 24 L. J. M. C. 49; *Staverton v. Ashburton*, 1855, 24 L. J. M. C. 53.

³ *R. v. Buckinghamshire JJ.*, 1843, 12 L. J. M. C. 29 (Ld. Denman, explaining *R. v. Bolton*, 1841, 1 Q. B. 74); *Welch v. Nash*, 1807, 8 East, 394.

⁴ *Crepps v. Durden*, 1776-7, 2 Cowp. 140; recognised (*Dallas C.J.*) in *Brittain v. Kinnaird*, 1819, 4 Moore, C. P. 50.

⁵ *Christie v. Unwin*, 1840, 3 P. & D. 204.

⁶ *R. v. Hulcott*, 1796, 6 T. R. 583.

⁷ *Kite and Lane's case*, 1822, 1 B. & C. 101. See, also, *R. v. Al*

were of a certain district, where an Act gave jurisdiction only to the magistrates of such district; where magistrates only possess jurisdiction over a dispute¹ when the applicant is a member of a friendly society entitled to money, and the party against whom the application is made was an officer of the society, if these facts be not mentioned in it, an order as to the dispute is bad;¹ and inquisitions have on several occasions been quashed where certain preliminary notices, which it was the duty of the sheriff or the trustees to give, did not appear on the face of the proceedings to have been given.²

§§ 1716—
1718.

§ 1717. In all the cases just cited, the facts, the omission of averments of which on the face of the proceedings was held to make the order bad, were preliminary matters *cognizable by the authority* whence the proceedings emanated. Had not this been the case, it would seem that no objection on the ground of their omission could have prevailed. This at least has been intimated by Cottenham, L.C.³

§ 1718. The case,⁴ in which this opinion was expressed, at all events distinctly decides that no judicial proceeding of an inferior tribunal shall be deemed defective for not stating facts that are *necessarily implied* from those which are alleged. In the case in question—a Railway Act having directed that if any landowner should not agree with the company as to the purchase-money, or should refuse to accept the sum offered by the company, or should, after notice, neglect to treat, or should not agree with the company for the sale of his interest, the company might issue a warrant to the sheriff to summon a compensation jury,—a warrant was issued, *purporting to be under the Act*, a jury was summoned, and an inquisition was recorded which purported to be taken “pursuant to the Act, on the oaths of

Saints, Southampton, 1828, 7 B. & C. 790.

¹ Day v. King, 1836, 5 A. & E. 359.

² R. v. May, of Liverpool, 1768, 4 Burr. 2244; R. v. Bagshaw, 1797, 7 T. R. 363; R. v. Norwich Road Trustees, 1836, 5 A. & E. 563. See, also, R. v. Worcestershire JJ., 1854, 23 L. J. M. C. 113, though that case would seem to be overruled by R. v.

Harvey, 1874, L. R. 10 Q. B. 46.

³ In Taylor v. Clemson, 1844, 11 Cl. & Fin. 610 (H. L.), questioning a contrary doctrine suggested (Ld. Mansfield) in R. v. Croke, 1774, 1 Cowp. 30, and (Ld. Denman) in R. v. South Holland Drainage, 1838, 8 A. & E. 437.

⁴ Taylor v. Clemson, 1844, 11 Cl. Fin. 610 (H. L.).

§§ 1718,
1719.

jurors, duly impanelled in pursuance of the warrant to the inquisition annexed, who assessed the sum to be paid, &c.;" but neither the warrant nor the inquisition stated that the owner had neglected to treat, or had had notice served on him, or had not agreed to sell. It was contended that these omissions were fatal to the proceedings; but the House of Lords (affirming the Exchequer Chamber) held that the warrant and inquisition stated sufficient facts to show the jurisdiction of the sheriff and jury; for the impanelling a jury and the assessment by them, being facts inconsistent with an agreement between the company and the landowner, necessarily implied non-agreement.

§ 1719.¹ A judgment in a prior suit or legal proceeding is, moreover, a bar to a second suit or legal proceeding only where the point in issue has been actually *determined* in the first. Therefore, if an action has been discontinued or withdrawn,² or has ended in a nonsuit,³ prior to the 2nd November, 1875,⁴ or if between that date and the 23rd October, 1883,⁵ the plaintiff has been non-suited, with the special leave of the court to proceed again,⁶ or if an action has been dismissed for want of prosecution under R. S. C., 1883, Ord. XXXVI., r. 12,⁷ or if for any other cause⁸ no final judgment of the court has been pronounced upon the matter in issue, the proceedings are not conclusive.⁹ The withdrawal of a juror, or the discharge of a jury, by consent, would seem to constitute no legal defence to a second

¹ Gr. Ev. §§ 529, 530, in some part.

² R. S. C. 1883, Ord. XXVI. r. 1; 3 Bl. Com. 296.

³ A judge cannot nonsuit upon the opening of counsel and without hearing evidence. See *Fletcher v. L. & N. W. Rail.*, [1892] 1 Q. B. 122 (C. A.).

⁴ When the Judicature Acts came into operation. See 3 Bl. Com. 296, 376, 377; *R. v. St. Anne*, Westminster, 1847, 16 L. J. M. C. 33; *Greely v. Smith*, 1846, 1 Woodb. & M. 181 (Am.); *Bevan v. Bevan*, 1860, 29 L. J. P. & M. 45.

⁵ On the next day after this the Rules of 1883 came into operation.

⁶ Under Ord. XLI. r. 6 of the

Rules of 1875 now repealed. Under the present practice a plaintiff can in no circumstances elect to be nonsuited and reserve the right to proceed again on the same cause of action, *Fox v. Star Newspaper Co.*, [1900] A. C. 19.

⁷ *Re Orrell Colliery Co.*, 1879, 12 Ch. D. 681; *Joly v. Swift*, 1847, 11 Ir. Eq. R. 410.

⁸ See *Langmead v. Maple*, 1865, 13 C. B. N. S. 255.

⁹ *Knox v. Waldoborough*, 1827, 5 Greenl. 185 (Am.); *Hull v. Blake*, 1816, 13 Mass. 155 (Am.); *Sweigart v. Berk*, 1822, 8 Serg. & R. 305 (Am.); *Bridge v. Sumner*, 1823, 1 Pick. 371 (Am.).

action.¹ Yet this is so far regarded as putting a final end to the litigation, that, unless something very special happens, as for instance, if the defendant were to commit a substantial breach of the terms upon which the juror was withdrawn, should the plaintiff again sue for the same cause, the court, on the application of the defendant, will stay the proceedings, and make the plaintiff pay the costs incurred.²

§§ 1719—
1720.

§ 1719A. A judgment is, moreover, not conclusive if it appears that the decision did not turn *upon the merits*;³ as, for instance, if the trial went off on a technical defect,⁴ or for faults in the pleadings,⁵ or because the action was misconceived,⁶ or because the debt was not then due,⁷ or because of a temporary disability of the plaintiff to sue,⁸ or the like.

§ 1720. In some cases the question, what constitutes a decision upon the merits, may be one which it is difficult to determine. It was at one time frequently before the Court of King's Bench, in cases of *appeals against orders of removals* being allowed by Quarter Sessions.⁹ In these cases, if the order has been quashed for informality,¹⁰ or merely because the pauper was not chargeable¹¹ or removable¹² at the time when it was made, the allowance of the appeal will not preclude the respondent parish from obtaining a second order of removal. Moreover, unless it appear on the face of the former proceedings

¹ *Sanderson v. Nestor*, 1826, Ry. & M. 302; *Everett v. Youells*, 1832, 3 B. & Ad. 439.

² *Gibbs v. Ralph*, 1845; *Thomas v. Exeter Flying Post Co.*, 1887, 18 Q. B. D. 822.

³ See *Gillespie v. Russel*, 1859, 3 Macq. 757 (H. L.); *Commiss. of Leith Hr., &c. v. Inspector, &c.*, 1866, L. R. 1 H. L. (Sc.) 17.

⁴ *Jenkins v. Merthyr Tydfil Council*, [1899] 80 L. T. 600; *Lepping v. Kedgewin*, 1675, 1 Mod. 207; *Lane v. Harrison*, 1820, 6 Munf. 573 (Am.); *McDonald v. Rainor*, 1811, 8 Johns. 442 (Am.).

⁵ *Hitchin v. Campbell*, 1771-2, 2 W. Bl. 831.

⁶ *Id.*

⁷ *New Eng. Bank v. Lewis*, 1829, 8 Pick. 113 (Am.).

⁸ *Dixon v. Sinclear*, 1832, 4 Vern.

354 (Am.).

⁹ See *R. v. Lancashire*, 1843, 12 L. J. M. C. 76; *R. v. Evenwood Barony*, 1843, 3 Q. B. 370; *R. v. Charlbury*, 1843, 13 L. J. M. C. 19; *R. v. Kingsclere*, 1843, 13 L. J. M. C. 22; *Ex parte Pontefract*, 1843, 3 Q. B. 391; *Ex parte Ackworth*, 1843, 13 L. J. M. C. 38; *R. v. Perranzabuloe*, 1844, 13 L. J. M. C. 47; *R. v. Clint*, 1841, 10 L. J. M. C. 151; *R. v. St. Mary, Lambeth*, 1845, 7 Q. B. 587; *R. v. Ellel*, 1845, 7 Q. B. 593.

¹⁰ *R. v. Penge*, 1793, Nolan's Rep. 176; *R. v. Cottingham*, 1834, 2 A. & E. 250; *R. v. Great Bolton*, 1845, 14 L. J. M. C. 122.

¹¹ *Osgathorpe v. Diseworth*, 1745-6, 2 Str. 1256; *R. v. Wheelock*, 1826, 5 B. & C. 511.

¹² *R. v. Wick St. Lawrence*, 1833, 5 B. & Ad. 526.

**§§ 1720,
1721.**

that the order of justices was quashed "not on the merits," parol evidence will be admissible to explain the particular ground upon which it was quashed.¹ In the absence of such evidence it will, however, be presumed that the order of Quarter Sessions for quashing it was an adjudication upon the settlement.² If, however, the Quarter Sessions, in quashing an order of removal, make an entry that it is quashed "not on the merits," this will conclusively prevent such order from operating as an estoppel between the parishes; and, on the hearing of an appeal against a subsequent order respecting the same settlement, the appellants will not be allowed to show that the former order was, in fact, quashed on the merits.³ Where an application is made to justices out of sessions and dismissed, such dismissal is seldom, if ever,—unless the case be governed by some special statute,⁴—regarded as a final adjudication, so as to operate as a bar to further inquiry.⁵

§ 1721. A party, against whom a judgment is offered in evidence, may, of course, always defeat its effect by showing that it has been *reversed*.⁶ This rule applies to all courts alike. Therefore the title of an executor or administrator may be successfully disputed, by proof that the probate or letters have been revoked;⁷ and a prisoner who has been found guilty upon an indictment, which, on a case reserved for the judges, has been pronounced bad in law, may again be put upon his trial for the same offence, because he has never yet been in real jeopardy.⁸ The *pendency of proceedings in error* or an appeal will not, however, prevent a judgment from operating as a bar.⁹ It, *a fortiori*,

¹ *R. v. Wheelock*, 1826, 5 B. & C. 511; *R. v. Wick St. Lawrence*, 1833, 5 B. & Ad. 526; *R. v. Widecombe-in-the-Moor*, 1847, 16 L. J. M. C. 44; *R. v. Leeds*, 1847, 9 Q. B. 910; *R. v. Macclesfield*, 1849, 13 Q. B. 881.

² *R. v. Wick St. Lawrence*, 1833, 5 B. & Ad. 526; *R. v. Yeoveley*, 1838, 8 A. & E. 818.

³ *R. v. St. Anne, Westminster*, 1847, 16 L. J. M. C. 33.

⁴ As to the effect of a dismissal of an information by a court dealing summarily with an indictable offence, see ante, §§ 1615-20.

⁵ *R. v. Machen*, 1849, 18 L. J. M. C. 213; *R. v. Hutchins*, 1881, 6 Q. B. D. 300 (C. A.). See post, § 1757.

⁶ 2 Smith, L. C. 659; Hynde's case, 1592-3, 4 Co. Rep. 71 b, cited in *Doe v. Wright*, 1839, 10 A. & E. 763; *Nowlan v. Gibson*, 1847, 12 Ir. L. R. 5; *R. v. Drury*, 1849, 3 C. & K. 193; *Wood v. Jackson*, 1831, 5 Wend. 9 (Am.).

⁷ B. N. P. 247.

⁸ *R. v. Reader*, 1830, 4 C. & P. 245; cited in *R. v. Bowman*, 1834, 6 C. & P. 342.

⁹ *Doe v. Wright*, 1839, 10 A. & E.

follows that no objection can be taken to the binding effect of a judgment as evidence, on the ground that the statement of claim is so defective that it would have been adjudged bad had the point of law been raised by the pleading.¹

§ 1722. In some few cases the *effect of a judgment will materially vary*, according as it has been pronounced *in favour of the one or the other party*. Thus, an order of Sessions *confirming* an order of removal is conclusive against all the world, that the pauper, at the date of the first order, was settled in the parish to which he was sent; but an order of Sessions *quashing* an order of removal is only conclusive between the contending parties, and only as to the exact point thereby decided, namely, that at the time when it was made, the appellant parish was not bound to receive the pauper.² If, too, the inhabitants of a parish be indicted for the non-repair of a road, and *convicted*, this will furnish conclusive evidence of their liability to do the repairs, on a subsequent indictment against them; but an *acquittal* on such an indictment will not establish the non-liability of the defendants, because it might have proceeded on the ground that the road was not out of repair, and thus the question of liability might not have been decided.³ It has never been expressly decided whether an acquittal on an information in rem on the Revenue side of the Queen's Bench Division will be conclusive proof of the illegality of the seizure as against strangers, in the same way as a judgment of condemnation is conclusive in favour of its legality. Lord Kenyon seems on one occasion, however, to have considered that it was conclusive.⁴ As an acquittal does not, like a conviction, ascertain any precise fact, but may be occasioned by the laches of the prosecutor, it would certainly seem reasonable to contend that strangers should not thereby be conclusively bound.⁵

§ 1723. In an action ⁶ brought for necessaries supplied to the

763; *Scott v. Pilkington*, 1862, 31 L. J. Q. B. 81.

¹ *Hughes v. Blake*, 1818, 1 Mason, 515 (Am.).

² *R. v. Wick St. Lawrence*, 1833, 5 B. & Ad. 526 (Id. Denman); Id. (*Parke, J.*); *Heston v. St. Bride*, 1853, 22 L. J. M. C. 65.

³ *R. v. St. Pancras*, 1793-4, Peake. R. 220; *R. v. Haughton*, 1853, 22 L. J. M. C. 89; *R. v. Nether Hallam*, 1854, 6 Cox, C. C. 435.

⁴ *Cooke v. Sholl*, 1793, 5 T. R. 255.

⁵ B. N. P. 245; 2 Ph. Ev. 38, 39.

⁶ *Day v. Spread*, 1842, *Jebb. & B. 163 (Ir.)*, (diss. Perrin, J.).

§§ 1723,
1724.

defendant's wife, while living separate from her husband, in support of the plaintiff's claim, witnesses were called to prove that the separation was justifiable on the wife's part, as it was owing to the cruel and violent treatment of her husband, and it was held that the defendant, to rebut this case, and also to prove that the wife had been guilty of adultery, might give in evidence a sentence of the Ecclesiastical Court, *dismissing* a suit instituted by the wife against her husband for a divorce on account of cruelty, in which suit the husband had made a counter allegation of adultery, but that it was entitled to very little weight; whereas, had the Ecclesiastical Court divorced the parties, its sentence would, doubtless, have been conclusive in favour of the plaintiff.

§ 1724. The rules which generally govern the admissibility and effect of foreign judgments are, in many respects, similar to those which prevail on the same subject with regard to home judgments. Foreign judgments include judgments, decrees, and other adjudications, whether strictly of record or not, emanating from Irish, Scotch, colonial, or foreign tribunals.¹ Foreign judgments, like home judgments, are always admissible, whether for or against strangers or parties, in proof of their existence;²—they are divisible into judgments in rem and judgments inter partes, and the former are evidence of the facts adjudicated as against all the world, while the latter are only admissible for and against parties and privies;³—they furnish no evidence whatever of matters collaterally or incidentally noticed in them, still less of matters to be inferred by argument from them;⁴—they must, in order to be received, finally determine the points in dispute, and be adjudications upon the actual merits;⁵—and they are open to be impeached on the ground, either of fraud⁶

¹ *Houlditch v. M. of Donegal*, 1834, 8 Bligh, N. R. 337 (H. L.); *Ferguson v. Mahon*, 1839, 11 A. & E. 179; *Harris v. Saunders*, 1825, 4 B. & C. 411, as to Irish judgments; *Cowan v. Braidwood*, 1840, 1 M. & Gr. 882; *Russell v. Smyth*, 1842, 11 L. J. Ex. 308, as to Scotch judgments; *Henderson v. Henderson*, 1848, 6 Q. B. 288, as to colonial decrees.

² *Tarleton v. Tarleton*, 1815, 4

M. & Selw. 20; ante, § 1667.

³ See ante, § 1673.

⁴ See ante, § 1711.

⁵ *Plummer v. Woodburne*, 1825, 4 B. & C. 625; *Smith v. Nicolls*, 1839, 5 Bing. N. C. 222; *Sadler v. Robins*, 1808, 1 Camp. 255; *Garcias v. Ricardo*, 1844, 14 Sim. 265; *Ricardo v. Garcias*, 1845, 12 Cl. & Fin. 368 (H. L.).

⁶ *Ochsenbein v. Papelier*, 1873, L. R. 8 Ch. 695; *Abouloff v. Oppen-*

or collusion,¹ or of want of jurisdiction, whether over the cause, §§ 1724—
over the subject-matter, or over the parties.² 1726.

§ 1725. In an action brought upon a foreign judgment, a *plaintiff* need not allege in his statement of claim, either that the foreign court had jurisdiction over the parties or the cause,³ or that the proceedings had been properly conducted.⁴ A *defendant*, however, when he pleads such a judgment by way of estoppel or of justification,⁵ is apparently bound to state all these particulars.

§ 1725A. The cases in which foreign judgments have been rejected as having emanated from a court having no jurisdiction are very numerous. Thus, sentences of foreign *prize* courts have repeatedly been held invalid by English judges, as having been pronounced by a court having no jurisdiction, when it appeared that the court had sat in a neutral country under a commission from a belligerent power,⁶—a country being, for this purpose, considered neutral, where its independence was only preserved in form, since one of the belligerents had poured into it such a body of troops, as to, in reality, possess the sovereign authority.⁷

§ 1726. With regard to marriages, the principle would seem to be that the courts of a country have no jurisdiction over marriages, except they derive such jurisdiction either from both (or possibly from one⁸) of the parties to the marriage, having, at the time when a divorce is sought, been domiciled within the territorial limits over which such courts exercise control, or from both (or possibly one⁸) of the parties having acquired a *bonâ fide* domicile within such limits subsequently to the marriage.

heimer, 1882, 10 Q. B. D. 295 (C. A.).

¹ Price v. Dewhurst, 1838, 8 Sim. 302 (Shadwell, V.-C.), S. C., 4 Myl. & Cr. 85, on appeal (Ld. Cottenham); Don v. Lippmann, 1837, 5 Cl. & Fin. 20 (H. L.) (Ld. Brougham); Magoun v. N. Engl. Ins. Co., 1840, 1 Story, R. 157 (Am.); Bradstreet v. Neptune Ins. Co., 1838, 3 Sumn. 600 (Am.).

² Price v. Dewhurst, 1838, 4 Myl. & Cr. 85 (Ld. Cottenham); Rose v. Himely, 1808, 4 Cranch. 269 (Am.).

³ Robertson v. Struth, 1844, 5 Q. B. 942.

⁴ Cowan v. Braidwood, 1840, 1

M. & Gr. 882.

⁵ Collett v. Ld. Keith, 1802, 4 Esp. 212; Gen. St. Navig. Co. v. Guillou, 1843, 13 L. J. Ex. 168. See Ricardo v. Garcias, 1845, 12 Cl. & Fin. 368 (H. L.).

⁶ The Flad Oyen, 1799, 8 T. R. 270, n.; Havelock v. Rockwood, 1799, 8 T. R. 268. These cases virtually overrule a doubt thrown out, by Ld. Kenyon, in Smith v. Surridge, 1801, 4 Esp. 26.

⁷ Donaldson v. Thompson, 1808, 1 Camp. 429 (Ld. Ellenborough).

⁸ See *infra*, note ⁷ to p. 1252.

**§§ 1726,
1726a.**

At all events (and the decision would appear to rest upon some such principle as that just stated) no foreign court has jurisdiction to dissolve a marriage of persons, who are of English domicile and who were married in England,¹ unless, at the date when its courts pronounce the judgment with regard to such a marriage, both parties are (or one at least of them is²) *bonâ fide* domiciled in the foreign state.³ On this principle it would seem that two American citizens, who were married in America, cannot become validly divorced by a court in Rome merely by going to that city for the purpose of obtaining such a divorce.⁴ It has been suggested, and indeed decided, in several cases both in England and Scotland that *bonâ fide* residence of the spouses, as apart from actual domicile is sufficient to give the local court jurisdiction to dissolve a marriage wheresoever contracted; it seems, however, to be now clear that nothing short of absolute *bonâ fide* domicile is sufficient for the purpose;⁵ there are, however, other remedies for matrimonial misconduct, short of dissolution, such as judicial separation on the ground of cruelty, which may be administered by the courts of the country in which spouses, domiciled elsewhere, are for the time resident.⁶

§ 1726A. Domicile, however, would appear to always confer jurisdiction over parties.⁷ Therefore, parties domiciled in Scotland,

¹ *Shaw v. Att.-Gen.*, 1870, L. R. 2 P. & D. 156; *R. v. Lolley*, 1812, R. & R. 237; *Briggs v. Briggs*, 1880, 49 L. J. P. 38; *Tovey v. Lindsay*, 1813, 1 Dow, 117; *In re Wilson's Trusts*, 1865, L. R. 1 Eq. 247. See *Harvey v. Farnie*, 1880, 49 L. J. P. D. & A. 33.

² See *infra*, note 7.

³ *Conway v. Beazley*, 1831, 3 Hagg. Ecc. 369; *Tollemache v. Tollemache*, 1861, 30 L. J. P. & M. 113; *Robins v. Dolphin*, 1858, 27 L. J. P. & M. 24; *Dolphin v. Robins*, 1859, 29 L. J. P. & M. 11 (H. L.); *Shaw v. Gould*, 1868, 37 L. J. Ch. 433 (H. L.); *Dorsey v. Dorsey*, 1838, 7 Watts, 350 (Gibson, C.J.); *Story*, Conf. § 230 a.

⁴ See this discussed in *Connelly v. Connelly*, 1850, 2 Roberts. 202.

⁵ *Le Mesurier v. Le Mesurier*, 1895, A. C. 517, in which all the previous cases were reviewed by the

Privy Council. See, also, *Armstrong v. Armstrong*, 1898, P. 178.

⁶ See *Le Mesurier v. Le Mesurier*, *supra*, at pp. 526-7; *Armstrong v. Armstrong*, *supra*.

⁷ The domicile of the husband will always give jurisdiction to the courts of the country in which it exists to dissolve a marriage. The domicile of the wife, as a rule, necessarily follows, and is the same as that of her husband. But after a *judicial* separation between the husband and wife has been formally pronounced, the wife becomes capable of acquiring a separate domicile for herself: *Dolphin v. Robins*, 1859, 29 L. J. P. & M. 11; *Le Sueur v. Le Sueur*, 1876, 1 P. D. 139. But whether a separation *de facto* by *mutual consent*, even for a long period, is sufficient to enable the wife to acquire a separate domicile is not clear. *Ld. Romilly*, in *Re Daly's Settlement*, 1858, 27

who have been married in England, may always be lawfully divorced by a Scotch court, and this even though the woman prior to the wedding was an English subject, and was divorced on grounds which in England would not have justified a dissolution of the marriage.¹ Apparently a divorce by the tribunals of any country in which the parties are domiciled would be good.²

§ 1726B. Whether the judgment of a foreign country as to the validity of a marriage which has been celebrated either within its territories between parties who are not subjects of that country, or beyond its territories between parties one or both of whom are natives of some other foreign state, would be binding upon our courts is an undetermined and difficult question, which depends upon principles of international law respecting jurisdiction which have not been yet definitely settled.³ On principle, however, a judgment with regard to any given marriage ought either to be wholly inadmissible, or else conclusive, in other countries, according to whether, when the facts are investigated, the tribunal which pronounced it appears to have possessed jurisdiction or no jurisdiction with regard to the marriage.⁴

§ 1727. It is very doubtful whether a foreign court can exercise any jurisdiction over *real property* situate in another country, even by a judgment *inter partes*. Clearly, it cannot exercise any such jurisdiction *immediately*, since its judgment cannot directly bind the land.⁵ Accordingly, a decree by the Court of Chancery in Ireland, after verdict upon an issue *devisavit vel non*, that the

L. J. Ch. 751, held that such a separation, even for thirty years, was insufficient to confer an independent domicile on a married woman. But *Ld. Cranworth*, in *Dolphin v. Robins*, 1859, 29 L. J. P. 11, said:—"There may be exceptional cases to which, even without judicial separation, the general rule would not apply—as, for instance, where the husband has abjured the realm, has deserted his wife, and established himself permanently in a foreign country, or has committed felony and been transported. It may be that in these and similar instances the nature of the case may be considered to give rise to necessary exceptions." See, also, *Tovey v. Lindsay*, 1813, 1 Dow, 117

(H. L.); *Le Sueur v. Le Sueur*, 1876, 1 P. D. 139; and *Armtyage v. Armtyage*, *supra*.

¹ *Harvey v. Farnie*, 1882, 8 App. Cas. 43 (H. L.). This case overrules *McCarthy v. De Caix*, 1831, 2 Russ. & My. 614. See *Warrender v. Warrender*, 1834, 9 Bligh, N. S. 89; and *Geils v. Geils*, 1852, 1 Macq. 36, 255 (H. L.).

² See *Ryan v. Ryan*, 1816, 2 Phill. Ecc. L. 332.

³ *Sinclair v. Sinclair*, 1798, 1 Hagg. Cons. 297. See *Connelly v. Connelly*, 1850, 2 Roberts. 202.

⁴ See *Dogliani v. Crespin*, 1866, L. R. 1 H. L. 301.

⁵ *Burnham v. Webster*, 1846, 1 Woodb. & M. 176 (Am.).

§§ 1727— instrument set up as a will was not an operative devise of certain
1729. Irish estates, cannot be pleaded in bar to a suit between the same parties in the Court of Chancery in England, instituted for the purpose of establishing the will, so far as it related to English property.¹ But a foreign court may apparently *indirectly* affect land in this country, by acting in personam, that is, through the medium of its power over the person entitled to the property. If, therefore, an Irish, colonial, or foreign court were, by a valid decree, to appoint a receiver in this country, the party on whose behalf the appointment was made, might probably, by action in the English Chancery Division, get his foreign decree carried into execution. At any rate, the converse of this has been decided by the House of Lords.²

§ 1728. If a party alleged to be liable upon a foreign judgment was not, at the time of the proceedings against him, either resident within the territories of the foreign state, or the subject of such state, such foreign court has no jurisdiction.³ To establish such want of jurisdiction, first, the statement of defence must contain every allegation which is necessary to render the judgment invalid, and must, in short, be good *in omnibus*;⁴ next, such defence must contain allegations that the defendant was not a subject of the foreign state, or resident, or even present, in it, at the time when the proceedings were instituted, so that he could not be bound, by reason of allegiance, or domicile, or temporary presence, by the decision of its courts.⁵

§ 1729. Besides the rules which have been stated in a preceding paragraph,⁶ to govern foreign as well as domestic judgments, there are other rules which are far more frequently applied by our courts to judgments of foreign tribunals than to judgments of courts in this country,—though *all* tribunals are equally bound

¹ *Boyse v. Colclough*, 1854, 24 L. J. Ch. 7.

² *Houlditch v. Donegal*, 1834, 8 Bligh, N. B. 337 (H. L.) (Ld. Brougham).

³ *Sirdar Gurdial Sing v. Faridkote*, 1894, A. C. 670. The parties may, however, by agreement give to the foreign court jurisdiction which it would not otherwise have had: *Feyerick v. Hubbard*, 71 L. J. K. B. 278.

⁴ *Cowan v. Braidwood*, 1840, 1 M. & Gr. 882; *Becquet v. MacCarthy*,

1831, 2 B. & Ad. 951; explained in *Don v. Lippmann*, 1837, 5 Cl. & Fin. 1 (H. L.) (Ld. Brougham); *Maubourquet v. Wyse*, 1867, Ir. R. 1 C. L. 471.

⁵ *Gen. St. Navig. Co. v. Guillon*, 1843, 13 L. J. Ex. 168; *Cowan v. Braidwood*, 1840, 1 M. & Gr. 882; *Russell v. Smyth*, 1842, 11 L. J. Ex. 308; *Reynolds v. Fenton*, 1846, 16 L. J. C. P. 15; *Rousillon v. Rousillon*, 1880, 14 Ch. D. 351.

⁶ Ante, § 1724.

to observe these latter rules. For instance, the effect of a foreign judgment will be wholly neutralized if it be apparent either upon the face of the proceedings, or by extrinsic proof, that such foreign judgment is contrary to the law of nations,¹ or is repugnant to natural justice,² or is founded on a mistaken notion of the court's jurisdiction,³ or is obviously or admittedly⁴ opposed to the law of the country where it was pronounced,⁵ or is so grossly defective as to render it doubtful what point, if any, was actually determined,⁶ or is manifestly erroneous, as professing to be made upon particular grounds, which plainly do not warrant the decision.⁷

A mere error of procedure on the part of the foreign court, however, is no ground for impeaching the judgment in this country,⁸ and this, apparently, even although it may render the judgment void in the country where it was pronounced.⁹

§ 1730. Examples of the meaning of the statement that a judgment must be disregarded whenever it is *repugnant to natural justice*, are afforded by a case¹⁰ in which a judgment pronounced in the Danish island of St. Croix was disregarded on it appearing that one of the litigating parties had himself acted as judge, and had decided the dispute in his own favour; and by several cases, (American as well as English), in which a defendant has defeated the effect of a foreign judgment by pleading and proving, that in the court from which it proceeded no suit can be instituted without

§§ 1729,
1730.

¹ *Baring v. Clagett*, 1802, 3 B. & P. 215; *Wolff v. Oxholm*, 1817, 6 M. & Selw. 92; *Simpson v. Fogo*, 1862, 32 L. J. Ch. 249.

² *Ferguson v. Mahon*, 1839, 11 A. & E. 179 (I.d. Denman, citing *Becquet v. MacCarthy*, 1831, 2 B. & Ad. 951; *Henderson v. Henderson*, 1844, 6 Q. B. 298; *Buchanan v. Rucker*, 1808, 1 Camp. 63; *Cowan v. Braidwood*, 1840, 1 M. & Gr. 882; *Sims v. Thomas*, 1841, 3 Ir. L. R. 417; *Messina v. Petrococcino*, 1872, L. R. 4 P. C. 144.

³ *Schibebv v. Westenholz*, 1870, L. R. 6 Q. B. 155; *Novelli v. Rossi*, 1831, 9 L. J. K. B. 307 (o.s.); as explained in *Castrique v. Imrie*, 1870, L. R. 4 H. L. 414 (Blackburn, J.), in answer to the House of Lords. See, also, *Godard v. Gray*, 1870, L. R. 6 Q. B. 139, deciding that a

foreign judgment could not be impugned as proceeding on a mistake as to English law.

⁴ *Meyer v. Ralli*, 1876, 1 C. P. D. 358.

⁵ *Sims v. Thomas*, 1841, 3 Ir. L. R. 417.

⁶ *Obicini v. Bligh*, 1832, 8 Bing. 335.

⁷ *Calvert v. Bovill*, 1798, 7 T. R. 523; *Pollard v. Bell*, 1800, 8 T. R. 434; *Reimers v. Druce*, 1857, 26 L. J. Ch. 196; *Simpson v. Fogo*, 1862, 32 L. J. Ch. 249; *Messina v. Petrococcino*, 1872, L. R. 4 P. C. 144.

⁸ *Pemberton v. Hughes*, 1899 1 Ch. 781.

⁹ *Id.*, Lindley, M.R., at p. 790.

¹⁰ *Price v. Dewhurst*, 1838, 8 Sim. 302. See *Gd. Junct. Can. Co. v. Dimes*, 1850, 19 L. J. Ch. 345.

**§§ 1730,
1731.**

issuing process, and yet that he was never arrested, or served with, or had notice or knowledge of, any process. The common justice of all nations requires that no condemnation should be pronounced behind the back of a man,¹ who has had no opportunity to appear and defend his interest, either personally or by his proper representatives.²

§ 1731. A statement of defence, seeking to get rid of the effect of a judgment, on the ground that it is contrary to the principles of natural justice, must carefully negative every combination of facts on which the judgment can be supported. If it merely

¹ Where a man had been expelled from a club without being heard in his own defence, the court, considering that the committee of the club had been exercising quasi-judicial functions improperly, declared their resolution void, and granted an injunction: *Fisher v. Keane*, 1880, 11 Ch. D. 353. See, also, *Dawkins v. Antrobus*, 1879, 17 Ch. D. 615.

² *Ferguson v. Mahon*, 1839, 11 A. & E. 179; *Buchanan v. Rucker*, 1808, 1 Camp. 63; *Cavan v. Stewart*, 1816, 1 Stark, R. 525; *Houlditch v. Donegal*, 1834, 8 Bligh, N. R. 337 (H. L.) (Id. Brougham); *R. v. Abp. of Canterbury*, 1859, 28 L. J. Q. B. 154; *Vallée v. Dunerque*, 1849, 18 L. J. Ex. 398; *In re Brook and Delcomyn*, 1864, 33 L. J. C. P. 246; *Copin v. Adamson*, 1875, L. R. 9 Ex. 345 (C. A.); *Story*, Conf. § 592; *Sawyer v. Maine Fire and Mar. Ins. Co.*, 1815, 12 Mass. 291 (Am.); *Bradstreet v. Neptune Ins. Co.*, 1839, 3 Sumn. 600 (Am.); *Magoun v. New Eng. Ins. Co.*, 1840, 1 Story, R. 157 (Am.); *Rangeloy v. Webster*, 1840, 11 New Hamp. 299 (Am.), recognised in *Burnham v. Webster*, 1846, 1 Woodb. & M. 178 (Am.). In *Dr. Bentley's case*, 1735-6, 1 Str. 557, *Fortescue-Aland, J.*, says, "I have heard it observed by a very learned man, that even God himself did not pass sentence upon Adam, before he was called upon to make his defence. 'Adam,' says God, 'where art thou? Hast thou eaten of the tree whereof I commanded thee that thou shouldst not eat?' And the same question was put to Eve also." The above passage was cited with approbation

by *Maule, J.*, in *Abley v. Dale*, 1850, 20 L. J. C. P. 33; and by *Byles, J.*, in *Cooper v. Wanda. Bd. of Works*, 1863, 32 L. J. C. P. 185. The author observed that it was not strictly in point; for that, though our first parents were certainly asked what they had to say why judgment should not pass against them, the same question was as certainly not put to the serpent; and that as he was at that time endowed with miraculous powers of speech, it seems strange that, before he was "cursed above all cattle," and was sentenced to "go upon his belly, and eat dust," he was not asked whether he had *really* "beguiled Eve" for the alleged offence. The Editor would add that the passage certainly is neither "strictly in point," nor even at all apposite, because, as the Fathers pointed out centuries ago (see *r.g.*, *S. Irenæus* [A.D. 176], *Adv. Haer. lib. iii., cap. xxxv.* § 2), while a human tribunal only acts upon an accumulation of evidence, and even after it has obtained this, only acquires a knowledge which is but imperfect and uncertain, the Divine Tribunal possesses an absolute, complete, and infallible knowledge; so that God, being omniscient, put His questions to our first parents, not to obtain knowledge, but for their own sakes, and in order that they, by urging how they had been "beguiled," might obtain the promise of the Redemption; but did not question the serpent, because He *knew* the latter to possess no excuse, and to have transgressed deliberately and wilfully.

deny that defendant has had notice of any *process*, and do not allege that without process the suit in a foreign court would be a nullity, such allegation will be bad; unless perhaps in the event of its containing a distinct averment that he has had no notice or knowledge whatever of the *suit*.¹

§ 1732. The most difficult point connected with foreign judgments is, to determine when they are *conclusive*, and when merely *primâ facie* evidence of the facts adjudicated by them.

§ 1733. First, we must consider when *foreign judgments in rem* will be conclusive. The most important of these are sentences of condemnation by foreign Courts of Admiralty on questions of *prize*. Lord Thurlow and Lord Ellenborough thought that the practice of receiving these in evidence at all rested upon an overstrained comity, and was often productive of cruel injustice.² But it is now too late to dispute the rule, which is, that such sentences, if not impeachable upon some one of the grounds before stated,³ will be conclusive against all persons, and in all countries, as to the fact upon which the condemnation proceeded where such fact is stated on the face of the sentence, free from ambiguity.⁴ But the ground of condemnation may be contested in an English court of law, when the language of the sentence, by setting out several reasons for the judgment, leaves it uncertain whether the ship was condemned upon a ground which would warrant its condemnation by the law of nations, or upon another ground, which amounts only to a breach of the municipal regulations of the condemning country.⁵

§ 1734. Lord Mansfield, and several other eminent judges of the

§§ 1731—
1734.

¹ Reynolds v. Fenton, 1846, 16 L. J. C. P. 15; Sheehy v. The Profess. Life Assur. Co., 1853, 22 L. J. C. P. 244; Maubourquet v. Wyse, 1867, Ir. R. 1 C. L. 471 (Ir. Ex. Ch.). The decision in Ferguson v. Mahon, 1839, 11 A. & E. 179, in which a defence of this nature was held good, though it merely denied notice of any *process*, must be supported (if it can be at all) on the ground that an English court will take judicial notice that an action in an Irish court must be commenced by *process*.

² Fisher v. Ogle, 1808, 1 Camp. 419; Donaldson v. Thompson, 1808,

1 Camp. 432.

³ Ante, §§ 1724, 1725, 1729.

⁴ Dalgleish v. Hodgson, 1831, 7 Bing. 504; Bolton v. Gladstone, 1804, 5 East, 160; Lothian v. Henderson, 1803, 3 B. & P. 499; Kindersley v. Chase, undated, 2 Park Ins. 743. See Cammell v. Sewell, 1860, 29 L. J. Ex. 350.

Dalgleish v. Hodgson, 1831, 7 Bing. 495; Hobbs v. Henning, 1864, 34 L. J. C. P. 117; Bernardi v. Motteux, 1781, 2 Doug. 575; Calvert v. Bovill, 1798, 7 T. R. 523; Baring v. Claggett, 1802, 3 B. & P. 215.

§§ 1734—
1736.

last century, thought that a sentence, which, without stating any ground of decision, should condemn a vessel as lawful prize, would be *conclusively presumed* to have been pronounced on some just ground.¹ But subsequently, Tindal, C.J., declared that, in order to bind strangers, the ground of the decision must appear clearly upon the face of the sentence, and that it will not suffice for it to be collected by *inference* only.² At all events, if in an action upon a policy of insurance containing a warranty of neutrality, the underwriter were to rely upon a general sentence of condemnation, the assured might still show that in fact the judgment had proceeded upon some ground other than that of an infraction of neutrality;³ although, in the absence of such proof the court would certainly feel bound to pronounce that the ship was condemned as enemies' property.⁴

§ 1735. Sentences concerning *marriage*, and sentences of *divorce*, form another important class of foreign judgments in rem.⁵ These when pronounced in the country where the parties are *bonâ fide* domiciled, will be regarded in the courts of England as conclusive of the facts adjudicated,⁶ unless they be open to some of the objections before stated;⁷ for otherwise, as Lord Hardwicke once observed, "the rights of mankind would be very precarious."⁸

§ 1736. Foreign jurists strongly contend, that a similar doctrine should prevail in favour of *all* judgments in rem; and that the decree of a foreign court, declaring the *status* of a person, and

¹ *Saloucci v. Woodmass*, undated, 2 Park Ins. 727 (Ld. Mansfield); recognised (Ld. Alvanley) in *Baring v. Clagett*, 1802, 3 B. & P. 215; and (Lawrence, J.) in *Lothian v. Henderson*, 1803, 3 B. & P. 527; *Pollard v. Bell*, 1800, 8 T. R. 434.

² *Dalgleish v. Hodgson*, 1831, 7 Bing. 504; *Fisher v. Ogle*, 1808, 1 Camp. 418 (Ld. Ellenborough).

³ *Calvert v. Bovill*, 1798, 7 T. R. 523.

⁴ For American authorities respecting proceedings in rem in foreign Courts of Admiralty, see *Croudson v. Leonard*, 1808, 4 Cranch. 434 (Am.); *Williams v. Armroyd*, 1813, 7 Cranch. 423 (Am.); *Hudson v. Guestier*, 1848, 4 Cranch. 293

(Am.); *The Mary*, 1815, 9 Cranch. 126 (Am.); *Bradstreet v. Neptune Ins. Co.*, 1839, 3 Sumn. 600 (Am.); *Grant v. M'Lachlin*, 1809, 4 Johns. 34 (Am.); *Burnham v. Webster*, 1846, 1 Woodb. & M. 176 (Am.).

⁵ The whole subject of foreign divorce is ably discussed in Story. Conf. §§ 200—230 b.

⁶ *Le Mesurier v. Le Mesurier*, 1895, A. C. 517.

⁷ Ante, §§ 1724, 1725, 1729.

⁸ *Roach v. Garvan*, 1748, 1 Ves. Sen. 159; Ex parte Cottington, 1678. 2 Swanst. 326 n.; cited in *Boucher v. Lawson*, undated. Cas. temp. Hard. 9; *Sinclair v. Sinclair*, 1798. 1 Hagg. Cons. 297.

placing him under guardianship as an idiot, or a minor, or a prodigal, should be of universal authority and obligation. So it doubtless would be deemed, in regard to all acts done within the territories of the sovereign whose tribunal pronounced the sentence. But, in this country, as also in America, the rights and powers of *guardians* are considered as strictly local; and no guardian is here admitted to have any right to receive the profits, or to assume the possession, of the real estate of his ward, or to control his person, or to maintain any action for his personalty without having received a due appointment from the proper English authority.¹

§ 1736—
1738.

§ 1737. The decisions of foreign courts of *bankruptcy* and *insolvency* must be regarded in the same way as decrees appointing guardians. Therefore, although the discharge of a debtor under the bankrupt or insolvent laws of a foreign State will so far be recognised in this country, that it will be held of binding authority with respect to all contracts made in such State, it cannot be pleaded here to an action, brought on a contract made or to be performed in any other State.²

§ 1738. A similar rule also applies to *executors* and *administrators*. In order to sue or be sued in any court in England, in respect of the personal rights of property of a testator or intestate the plaintiff,³ or defendant,⁴ as the case may be, must appear to have obtained a probate, or letters of administration, in the proper court of *this* country. A foreign or colonial probate or letters,

¹ Dawson v. Jay, 1854, 2 Sm. & G. 199; Ex parte Watkins, 1752, 2 Ves. Sen. 470 a; Story, Conf. §§ 499, 504, 504a, 594; Morrell v. Dickey, 1814, 1 Johns. Ch. R. 153 (Am.); Kraft v. Wickey, 1832, 4 Gill & J. 332 (Am.). In Grimwood v. Bartels, 1877, 46 L. J. Ch. 788, Hall, V.-C., however, allowed a foreign curator ad bona of a lunatic to receive the income from the lunatic's real estate in this country, though he would not allow the estate itself to be conveyed to him. See, also, In re Garnier, 1872, L. R. 13 Eq. 532; and Scott v. Bentley, 1855, 24 L. J. Ch. 244, where Wood, V.-C.,—apparently misled by an erroneous reference (see (1877) 46

L. J. Ch. 789)—held, that a curator bonis of a lunatic's estate appointed by a Scotch court might sue in England for debts due to the lunatic. Sed qu.

² Towne v. Smith, 1845, 1 Woodb. & M. 115 (Am.) (Woodbury, J., fully discussing this question).

³ Whyte v. Rose, 1842, 4 P. & D. 199; Spratt v. Harris, 1833, 4 Hagg. Ecc. 405; Price v. Dewhurst, 1838, 8 Sim. 302 (Ld. Cottenham); Lasseur v. Tyrconnel, 1846, 10 Beav. 28. But see M'Mahon v. Rawlings, 1848, 16 Sim. 429. See, also, Vanquelin v. Bouard, 1863, 33 L. J. C. P. 78.

⁴ Silver v. Stein, 1852, 21 L. J. Ch. 312 (Kindersley, V.-C.).

§§ 1738,
1739.

granted by the court of the country where the deceased was domiciled, may, indeed, be brought under the notice of the English Court of Probate, with the view of inducing that tribunal to clothe the foreign executor or administrator with proper English powers; but until he be so clothed, an executor, under either a foreign or colonial probate, cannot sue in this country.¹ But a man who is so clothed may sue without showing, in addition to his English title, that any probate or letters have been granted to him by the foreign court.² If, however, an executor or administrator, under a valid foreign probate or grant, has received and given a release for a debt due to the deceased in that foreign country, this will bar any demand against the debtor on the part of an executor or administrator appointed in England; since, to this extent, and for this purpose only,³ the English tribunals will recognise and give effect to foreign probates and grants.⁴

§ 1739. Secondly,⁵ we must consider the question as to when foreign judgments *inter partes* will or will not be conclusive, if set up by way of defence to an action in a domestic court. Such a judgment, when pronounced *adversely* to the party who brings the second action, and pronounced under circumstances which render it effective in this country, will be conclusively binding upon him if properly pleaded by way of estoppel.⁶ The statement of defence, setting up the answer to such an action which is afforded by a foreign judgment, need not set forth the proceedings and judgment at length;⁷ but it must contain averments, either that the plaintiff was, at the commencement of the foreign suit, subject to the jurisdiction of the foreign country, by reason of allegiance, domicile, or temporary presence,⁸ or that the foreign

¹ Price v. Dewhurst, 1838, 8 Sim. 302; Enohin v. Wylie, 1862, 10 H. L. C. 1; Miller v. James, 1872, L. R. 3 P. & D. 4; Limehouse Board of Works, Ex parte Vallance, 1883, 24 Ch. D. 177.

² Whyte v. Rose, 1842, 4 P. & D. 199; Carter and Crost's case, 1585, Godb. 33.

³ See Tighe v. Tighe, 1877, Ir. 11 Eq. 203; Lightfoot v. Bickley, 1830, 2 Rawle, 431 (Am.); Story, Conf. § 522.

⁴ Daniel v. Luker, 1571, 3 Dyer, 305A, pl. 58; recognised and explained in Whyte v. Rose, 1842, 4 P. & D. 199.

⁵ See supra, § 1732.

⁶ Philips v. Hunter, 1795, 2 H. Bl. 402; Plummer v. Woodburne, 1825, 4 B. & C. 625; Ricardo v. Garcias, 1845, 12 Cl. & Fin. 368 (H. L.).

⁷ Ricardo v. Garcias, 1845, 12 Cl. & Fin. 368 (H. L.).

⁸ Gen. St. Navig. Co. v. Guillon, 1843, 13 L. J. Ex. 168.

court had jurisdiction over the subject-matter of the suit, or that by the law of the foreign country, the judgment recovered was final and conclusive, so as to be an absolute bar to a fresh action;¹ and also an averment that the matters in issue in the foreign court were identical with those sought to be put in issue in the present suit.² If there be no such averment, as just mentioned to be necessary, contained in a defence, such defence will be bad if this point of law be duly raised by the plaintiff's reply. Should the defendant, instead of *pleading* the judgment, content himself with *putting it in evidence*, it will then—like a domestic judgment under similar circumstances—be merely cogent, but not conclusive, evidence in his behalf.³

§§ 1739—
1740a.

§ 1740. Where the foreign judgment was pronounced in favour of a party who brings in this country a second suit, the defendant cannot avail himself of such judgment as a defence. For a foreign judgment does not change the nature of the debt or damage sought to be recovered; the plaintiff has no higher remedy in consequence of it, and cannot issue immediate execution upon it in this country.⁴ Consequently he may either bring an action of assumpsit upon the foreign judgment, or again sue in this country upon the original cause of action. He has his election as to which of these courses he will take; but obviously his only mode of enforcing his rights is to, in some form, bring a fresh action.⁵

§ 1740a. If the foreign action was by the same plaintiff, and a judgment recovered in it has had satisfaction entered up, it will then, if properly pleaded, be conclusive in favour of the defendant,⁶ and this is so, even although the plaintiff may have recovered judgment in the foreign action for a sum smaller than that which he claimed in the foreign action and smaller than that claimed by him in the subsequent action in England, so long as the cause of action is the same.⁷ Moreover, a man who

¹ *Plummer v. Woodburne*, 1825, 4 B. & C. 625; *Frayes v. Worms*, 1861, 10 C. B. N. S. 149.

² *Ricardo v. Garcias*, 1845, 12 Cl. & Fin. 368 (H. L.).

³ *Ante*, §§ 91, 1673.

⁴ *Hall v. Odber*, 1809, 11 East, 118.

⁵ *Smith v. Nicolls*, 1839, 5 Bing. N. C. 222; *Wilson v. Lady Dunsany*, 1854, 23 L. J. Ch. 492.

⁶ *Barber v. Lamb*, 1860, 29 L. J. C. P. 234.

⁷ *Taylor v. Hollard*, [1902] 1 K. B. 676.

§§ 1740a, 1741. has been tried and acquitted in a foreign country by a court having competent jurisdiction, may plead and prove such acquittal in bar of any indictment preferred against him in this country for the same offence.¹

§ 1741. Thirdly,² a foreign judgment *inter partes* may be enforced in the English courts by an action upon it by the successful party to whom any money was due under it, whether it is a judgment given by a court of record, or one not of record, by a superior or inferior court, by a court of common law, or by one exercising equitable jurisdiction, whenever a clear balance has been ascertained, and a final³ decision on the merits has been *bonâ fide* pronounced.⁴ Even costs awarded by a decret of the Court of Session in Scotland in a suit for a divorce, have been recovered by an action brought against the defendant while resident in this country;⁵ and it seems that, were litigation to arise in France relating to real property there, and costs to be given against a party who should afterwards come to this country, an action on the judgment for such costs might be maintained here.⁶ The decrees of foreign courts of equity might indeed, in some instances, not be enforceable in the English Common Law Division, because they might involve collateral and provisional matters, to which such court could not conventionally give full effect; but even then the English Chancery Division would entertain an action founded on such a foreign decree, for the purpose of giving effect to it in regard to English property.⁷ So much, then, as to the subject-matter of foreign judgments which may be enforced in this country. No action will lie upon a foreign judgment which is on the face of it defective.⁸ But on the other hand, in an action in this country upon

¹ *R. v. Roche*, 1775, 1 Lea. 134.

² See *supra*, § 1732.

³ If the decree or judgment be not final, the action upon it is not maintainable: *Patrick v. Shedden*, 1853, 2 E. & B. 14; *Paul v. Roy*, 1852, 21 L. J. Ch. 361.

⁴ *Henderson v. Henderson*, 1844, 6 Q. B. 288; *Sadler v. Robins*, 1807, 1 Camp. 255; *Henley v. Soper*, 1828, 8 B. & C. 16, as to decrees of colonial courts of equity; *Harris v. Saunders*, 1825, 4 B. & C. 411, as to a judg-

ment of one of the superior courts in Ireland; *Arnott v. Redfern*, 1826, 3 Bing. 353, as to a judgment of a Court of Admiralty in Scotland.

⁵ *Russell v. Smyth*, 1842, 11 L. J. Ex. 308.

⁶ *Id.* (Ld. Abinger).

⁷ *Henderson v. Henderson*, 1844, 6 Q. B. 288 (Ld. Denman); *Houlditch v. M. of Donegal*, 1834, 8 Bligh. N. R. 337 (H. L.).

⁸ *Buchanan v. Rucker*, 1808, 1 Camp. 63.

a judgment of a foreign court, it seems probable that¹ the English courts will not entertain a defence which could have been set up in such foreign court but was not then advanced.² With regard to procedure on such a judgment, it should be noted that as a foreign judgment is only *prima facie* evidence of a debt persons who hold property as trustees for the debtor cannot be joined as defendants in such an action.³

§§ 1741—
1744.

§§ 1742-3. It is, however, admitted on all sides that foreign judgments are *prima facie* evidence in support of the plaintiff's claim and are to be deemed right until the contrary is established.⁴ But the question whether such judgments are to be deemed *conclusive*, or whether the defendant, by going at large into the *original merits*, can dispute the propriety of the decisions, has given rise to great difference of opinion.

§ 1744. On the one hand it has been held that foreign judgments are so far conclusive that the defendant is not at liberty to raise any defence to them which could have been raised (though it in fact was not) in the foreign court. This view has been taken several times by the Court of Queen's Bench,⁵ once by the Court of Common Pleas,⁶ and once by the Court of Exchequer;⁷ and has been also advanced by Lord Nottingham,⁸ Lord Kenyon,⁹ Lord Ellenborough,¹⁰ Sir L. Shadwell,¹¹ Lord Wensleydale,¹² and the Court of Exchequer in Ireland.¹³ On the

¹ This, however, is rather a vexed question; as to the conflicting views on which, see post, § 1744.

² *Henderson v. Henderson*, 1844, 6 Q. B. 288; *Sadler v. Robins*, 1807, 1 Camp. 255.

³ *Hawksford v. Giffard*, 1886, 12 App. Cas. 122 (P. C.).

⁴ *Sinclair v. Fraser*, 1771 (H. L.), cited in 20 How. St. Tr. 468, 469, and in 1 Doug. 4, n.; recognised in *Arnott v. Redfern*, 1826, 3 Bing. 353, and in *Robertson v. Struth*, 1844, 5 Q. B. 942; *Cowan v. Braidwood*, 1826, 1 M. & Gr. 882.

⁵ *Henderson v. Henderson*, 1844, 6 Q. B. 288; *Ferguson v. Mahon*, 1839, 11 A. & E. 179; *Bank of Australasia v. Nias*, 1851, 16 Q. B. 717; *Scott v. Pilkington*, 1862, 31

L. J. Q. B. 81.

⁶ *Vanquelin v. Bouard*, 1863, 33 L. J. C. P. 78.

⁷ *De Cosse Brissac v. Rathbone*, 1861, 30 L. J. Ex. 238.

⁸ *Gold v. Canham*, 1678-9; cited in note to *Kennedy v. Cassillis*, 1818, 2 Swans. 325.

⁹ *Galbraith v. Neville*, 1755-6, 1 Doug. 6, n.

¹⁰ *Tarleton v. Tarleton*, 1815, 4 M. & Selw. 22.

¹¹ *Martin v. Nicolls*, 1830, 3 Sim. 458.

¹² Citing *Martin v. Nicolls*, 1830, 3 Sim. 458, in *Becquet v. MacCarthy*, 1831, 2 B. & Ad. 954.

¹³ *Sims v. Thomas*, 1841, 3 Ir. L. R. 415.

§§ 1744,
1745.

other hand, Lord Hardwicke,¹ Lord Mansfield,² Chief Baron Eyre,³ Mr. Justice Buller,⁴ Mr. Justice Bayley,⁵ and in particular Lord Brougham,⁶ have strenuously contended that foreign judgments, when actions are brought upon them, are not conclusive, but are merely *prima facie* evidence on behalf of the plaintiff. The other opinion appears to be that a judgment of a foreign court of competent jurisdiction is so far conclusive upon the merits that it will be acted upon by the courts of this country unless it is shown by the record of the proceedings on which the original judgment was founded, that it was unjustly or fraudulently obtained without actual personal notice to the party affected by it, or unless it is clearly and unequivocally shown by extrinsic evidence, that the judgment has manifestly proceeded upon false premises or inadequate reasons, or upon a palpable mistake of local or foreign law.⁷

§ 1745. It at any rate appears to be acknowledged law, both in England or America,⁸ that, when a foreign judgment,—instead of being itself the consideration of the promise declared on,—merely comes *incidentally* or *collaterally* in question, it cannot be disputed. Thus, in an action on a covenant to indemnify, given on a dissolution of partnership, the plaintiff, in order to prove the damnification, put in a judgment recovered in a foreign court by a creditor of the firm against himself and the defendant, in consequence of which his property had been seized; and the defendant was not allowed to show that the proceedings were erroneous.⁹

¹ *Isquierdo v. Forbes*, 1750-1; cited (*Ld. Mansfield*) in 1 Doug. 6.

² *Walker v. Witter*, 1778, 1 Doug. 1.

³ *Philips v. Hunter*, 1795, 2 H. Bl. 410.

⁴ *Galbraith v. Neville*, 1755-6, 1 Doug. 6, n.; *Messin v. Ld. Massacreene*, 1791, 4 T. R. 493.

⁵ *Tarleton v. Tarleton*, 1815.

⁶ *Houlditch v. M. of Donegal*, 1834, 8 Bligh. N. R. 337 (H. L.); *Don v. Lippmann*, 1837, 5 Cl. & Fin. 1 (H. L.).

⁷ *Wheaton*, 4th Eng. ed. p. 231; see also *Westlake*, 3rd ed. § 328; *Smith, L. C.*, 11th ed. 795-71; *Story, Conflict of Laws*, §§ 607-8. See also some remarks by the late

Ld. Campbell, C.J., in *Bank of Australasia v. Nias*, 1851. This opinion appears to be in conformity with the view taken by the most eminent public jurists that a final judgment in a personal action in the courts of competent jurisdiction of one state ought to have conclusive effect of a *res judicata* in every other state wherever it is pleaded in bar of another action for the same cause. *Wheaton*, 231, citing *Vattel*, liv. ii., Ch. vii., §§ 84, 85; *Marten's Droit des Gens*, §§ 93, 94, 95; *Klüber Droit des Gens*, § 59; *Deutsche Bundes Recht*, § 366.

⁸ See cases cited in *Cowen's notes* to 1 Ph. Ev. 353, Am. ed.

⁹ *Tarleton v. Tarleton*, 1815, 4

§ 1746. Another rule as to foreign judgments (and one which, as already stated, is clear¹), is, that a foreign judgment does not occasion a *merger* of the original cause of action. Therefore, when it becomes necessary to enforce the plaintiff's demand in this country, he may either resort to such original cause of action, or bring an action upon the judgment.² If he again sue on the original cause of action the defendant may, notwithstanding the production of the judgment in the former action, again dispute the plaintiff's demand, for the plaintiff has himself courted a reinvestigation of the merits.³

§§ 1746—
1747a.

§ 1747. Such being the general rules governing the admissibility and effect of domestic and foreign judgments, one or two statutes, by which the receipt in evidence of the adjudications and proceedings of particular tribunals is regulated, must now be pointed out. Proceedings in *Courts of Bankruptcy*—such as adjudications and others—may, in some instances, be proved by production of the Gazette in which they were published,⁴ and *all* are capable of proof by producing either the original documents, or copies of them, provided such originals or copies be either sealed with the seal of a bankruptcy court, or signed by a judge in bankruptcy, or, in the case of copies, be certified as true by any registrar of the court.⁵

§ 1747A. It remains to inquire what the *effect* of such documents is after they have been proved. Now, the Bankruptcy Act, 1883,⁶ enacts that “a copy of the London Gazette containing any notice inserted therein in pursuance of this Act⁷ shall be evidence of the facts stated in the notice,” and also provides⁸ that “the production of a copy of the London Gazette, containing any notice of a receiving order, or of an order adjudging a

M. & Selw. 20; recognised, by *Ld. Brougham*, in *Houlditch v. M. of Donegal*, 1834, 8 Bligh, N. R. 337 (H. L.).

¹ Ante, § 1740.

² *Hall v. Odber*, 1809, 11 East, 118; *Smith v. Nicolls*, 1839, 5 Bing. N. C. 222; *Bk. of Australasia v. Harding*, 1850, 19 L. J. C. P. 345; *Kelsall v. Marshall*, 1856, 26 L. J. C. P. 19.

³ See 2 *Smith*, L. C. 869.

⁴ Ante, § 1549.

⁵ Ante, § 1548.

⁶ 46 & 47 V. c. 52. By § 132, sub-s. 1.

⁷ § 13, as to receiving order; § 20, sub-s. 2, as to order of adjudication; § 35, sub-s. 3, as to order annulling adjudication. See, also, *Bkptcy. Rules*, 1883, F. 127, containing, as sub-forms, six other notices. All these notices must be gazetted by the Board of Trade: r. 203.

⁸ By § 132, sub-s. 2.

§§ 1747a debtor bankrupt, shall be *conclusive* evidence in all legal proceedings of the order having been duly made and of its date.”
—1750.

§ 1748. Again,¹ “a certificate of the official receiver,” that a composition, or a scheme of arrangement, has been duly accepted and approved by the court, “shall, in the absence of fraud, be *conclusive* as to its validity.” Again, another section of the Bankruptcy Act, 1883,² makes the certificate granted by the Board of Trade declaring any person to be a trustee in bankruptcy “*conclusive* evidence of his appointment;” yet another section of the same Act³ provides, that the appointment “shall take effect as from the date of the certificate.” In short, an order of adjudication is thenceforth to be regarded (as it ought to be) as a judgment in rem.⁴

§ 1749. The order of the Board of Trade releasing the trustee of a bankruptcy, operates, by the Bankruptcy Act, 1883,⁵ to “discharge him from all liability in respect of any act done or default made by him in the administration of the affairs of the bankrupt, or otherwise in relation to his conduct as trustee; but any such order may be revoked on proof that it was obtained by fraud, or by suppression or concealment of any material fact.”

§ 1750. The order of discharge of a bankrupt,⁶ which the Court of Bankruptcy is, under certain circumstances, empowered to grant, operates as a discharge of the bankrupt from all debts provable in bankruptcy, save as otherwise provided by the Bankruptcy Act, 1883,⁷ and, moreover, it will be “conclusive evidence of the bankruptcy, and the validity of the proceedings thereon.” When an order of discharge has been granted, the court, if it thinks fit, may award to the bankrupt “a certificate to the

¹ By 53 & 54 V. c. 71, § 3, sub-s. 13.

² § 134, of 46 & 47 V. c. 52.

³ § 21, sub-s. 4, of 46 & 47 V. c. 52.

⁴ *Revell v. Blake*, 1873, L. R. 7 C. P. 300; L. R. 8 C. P. 533; *Ex parte Learoyd*, in re Foulds, 1878, 10 Ch. D. 3 (C. A.).

⁵ § 82, sub-s. 3. See, also, 35 & 36 V. c. 58, § 116 (Ir.).

⁶ As to which see Bkptcy. Rules, 1886, 1890, F. 62. See, also, as to

the form and effect of a “certificate of conformity” granted to a bankrupt by the Irish Court of Bankruptcy, 35 & 36 V. c. 58, §§ 57 and 58, Ir., amended by 53 & 54 V. c. 71, § 10; and of a certificate in arrangement cases granted in Ireland, id. § 64, Ir.

⁷ 46 & 47 V. c. 52, § 30, sub-ss. 1 and 2. See *Jakeman v. Cook*, 1879, 4 Ex. D. 26.

⁸ Id. § 30, sub-s. 3.

effect that his bankruptcy was caused by misfortune without any misconduct on his part;" and this certificate will remove the disqualifications to which he would otherwise be subjected under sect. 32 of the Bankruptcy Act, 1883.¹

§§ 1750—
1753.

§ 1751. While proof of particular bankruptcy documents is thus provided for by special sections of the Bankruptcy Act, 1883, the same Act also contains² a general provision, that "all documents purporting to be orders or certificates made or issued by the Board of Trade, and to be sealed with the seal of the Board, or to be signed by a secretary or assistant secretary of the Board, or any person authorised in that behalf by the President of the Board, shall be received in evidence, and deemed to be such orders or certificates, without further proof unless the contrary is shown." It also provides,³ that "a certificate signed by the President of the Board of Trade that any order made, certificate issued, or act done, is the order, certificate, or act of the Board of Trade, shall be *conclusive* evidence of the fact so certified."

§ 1752. The proof of such notices as are by the Bankruptcy Act, 1883, required to be gazetted or advertised in local papers, is moreover facilitated by the registrar of each court being empowered⁴ to file with the proceedings a memorandum referring to and giving the date of each advertisement; and by such memorandum being made⁵ "*prima facie* evidence that the advertisement in question was duly inserted in the issue of the Gazette or paper to which the memorandum refers."

§ 1753. Little need be said respecting the admissibility and effect of other judicial documents. *Answers* in Chancery, put in under the old system of Chancery pleading, and such *pleas* as were under that system, put in upon oath, are, as we have seen,⁶ receivable against the party by whom they were sworn, as cogent admissions of the allegations which they contain; but, as has also been pointed out,⁷ *demurrers* in equity are not

¹ See § 32, sub-s. 2; Bkpty. Rules, 1886, 1890, F. 66.

² In sub-s. 1 of § 140, of 46 & 47 V. c. 52.

³ By sub-s. 2 of § 140, of 46 & 47 V. c. 52.

⁴ See Bkpty. Rules, 1886, 1890,

r. 17 (1), F. 175; and r. 17 (2) and F. 175.

⁵ By Bkpty. Rules, 1886, 1890, r. 17 (4).

⁶ Ante, § 727.

⁷ Ante, § 828.

§§ 1753— so receivable, since they were merely hypothetical statements,
1756. which, *assuming* the facts to be as alleged, denied that the defendant was bound to answer. *Bills* in Chancery, whether for relief or for discovery, are alike inadmissible, excepting to prove their own existence, or the institution of a suit, or that certain facts were in issue between the parties: their exclusion for other purposes resting upon the ground that they contained nothing more than mere suggestions of counsel, made for the purpose of obtaining an answer upon oath.¹ It seems to follow, by parity of reasoning, that pleadings at common law under the old system are also inadmissible as evidence of the truth of the facts stated therein; ² unless they were pleadings requiring to be verified by affidavit.³

§§ 1754-5.⁴ *Depositions*, though informally taken, are receivable, like any other admissions, against the deponent whenever he is a party; ⁵ or they may be used to contradict and impeach him, when he is afterwards examined as a witness.⁶ But before they will be available as *secondary evidence*, and as a substitute for *vivâ voce* testimony, they must be proved to have been regularly taken, under legal proceedings duly pending, or on some other occasion sanctioned by law.⁷ It must in addition also appear—unless indeed the case be one provided for by statute, or by a rule of court—that the witness himself cannot be personally produced.⁸ The depositions of deceased witnesses will in some cases be admissible even against strangers: as, for instance, if they relate to a custom, prescription, or pedigree, where reputation would be evidence; for, as the unsworn declarations of persons deceased would be here received, their declarations on oath are *à fortiori* admissible.

§ 1756. The effect as a judgment of a refusal of an application at chambers will vary according to the words in which the refusal was made. If the words “no order” be indorsed upon the summons, the judge will, in general, be held to have pronounced no

¹ *Boileau v. Rutlin*, 1848, 2 Ex. 678; *Doe v. Sybourn*, 1796, 7 T. R. 2; *Taylor v. Cole*, 1799, 7 T. R. 3, n.: ante, § 859.

² *Boileau v. Rutlin*, 1848, 2 Ex. 678.

³ See 15 & 16 V. c. 76, §§ 80, 81,

now repealed.

⁴ Gr. Ev. §§ 552, 555, in part.

⁵ Ante, § 727.

⁶ Ante, §§ 1426, 1446 et seq.

⁷ Ante, §§ 464 et seq.

⁸ Ante, §§ 472 et seq.

decision upon the merits—so much so, that the party who failed will be allowed to make a second application—but if the indorsement be “application dismissed,” this will be regarded as a judgment, so much so, that if he wishes to get rid of it the applicant must, within the time limited by the Rules of Practice, move the court to rescind it.¹

§§ 1756—
1758.

§ 1757. In many cases an unsuccessful application to a police court does not bar other proceedings. Thus, a person who has applied to a metropolitan police magistrate under the Metropolitan Police Courts Act, 1839,² for an order for the delivery up of certain goods of less value than £15, which, after inquiry, has been refused, is not thereby estopped from bringing an action of trover for the same property.³

§ 1757A. Moreover, a refusal by justices in petty sessions to make an order for maintenance of a bastard, even when made on the merits, is no bar to a second application by the mother, even after a hearing upon the merits, though the justices at the second hearing may take into consideration the fact of the former dismissal, as a material element in guiding their judgment.⁴ An order in bastardy drawn up in such a form as to be void in law is, too, no bar to a second summons in the same matter between the same parties, even though the first order has never been formally set aside on appeal.⁵ And an order of quarter sessions, quashing an order of affiliation as being “bad in form,”⁶ or in the absence of the applicant, owing to bonâ fide mistake,⁶ will not be regarded as a decision on the merits, so as to preclude the woman from applying to the petty sessions for a fresh order.⁷ When, however, on appeal to quarter sessions, an order of affiliation is quashed on the ground of the insufficiency of the corroborative evidence,⁸ such order of quarter sessions is final, and no further proceedings can be taken before justices.⁹

§ 1758. The law as to the admissibility and effect of *awards*, as

¹ *R. v. Machen*, 1849, 18 L. J. M. C. 213; *R. v. Herrington*, 1864, 3 New. R. 468.

² 2 & 3 V. c. 71, § 40.

³ *Dover v. Child*, 1876, 1 Ex. D. 172.

⁴ *R. v. Machen*, 1849, 18 L. J. M. C. 213; *R. v. Grant*, 1867, 36 L. J. M. C. 89; 35 & 36 V. c. 65, § 4; 8 & 9 V. c. 10 (“*The Bastardy Act*, 1845”).

⁵ *R. v. Brisby*, 1849, 18 L. J. M. C. 157.

⁶ *Ex parte Harrison*, 1852, 16 Jur. 726; *R. v. Glynne*, 1871, L. R. 7 Q. B. 16.

⁷ *R. v. May*, 1880, 5 Q. B. D. 382.

⁸ 8 & 9 V. c. 10 (“*The Bastardy Act*, 1845”), § 6.

⁹ *R. v. Glynne*, 1871, L. R. 7 Q. B. 16.

§§ 1758,
1759.

being judgments between the parties, is as follows. The award of an arbitrator, duly appointed which has not been set aside on appeal,¹ is as conclusive as the judgment of any other competent tribunal upon the subject-matter referred to him.² But an award, unlike a verdict or judgment, cannot be received as evidence in the nature of reputation;³ though it may occasionally be admissible, in conjunction with the submission to arbitration, as an act of ownership.⁴ An award, moreover, is not evidence of an account stated between the parties to the submission;⁵ unless, perhaps, in the single event of there being no regular agreement to refer, and consequently, no award capable of being enforced in law. In such a case, as the arbitrator is not a judge, he might possibly be deemed the agent of the parties for the purpose of settling their accounts.⁶

§ 1759. The law with respect to the admissibility and effect of probates, and of letters of administration with wills annexed, as being in the nature of judgments, has been much altered by the Court of Probate Act, 1857.⁷ Formerly such documents were uniformly rejected, whether tendered as primary or as secondary evidence of the contents of a will, on the trial of any cause relating to *real estate*;⁸ and so absurdly jealous were the temporal courts of spiritual interference, that even when a will of lands was irretrievably lost, nothing would induce them to look at the probate,⁹ though had the inquiry related to personalty, such a document would have furnished conclusive evidence,¹⁰ and though they readily received the testimony of a witness, who undertook to state the contents of the will, having heard it once read before the testator's family on the day of his funeral.¹¹ This anomaly

¹ For the means of appointment of arbitrators, and the methods and grounds of impeaching their awards, see *Russell on Arbitration and Award*, 8th ed.

² *Doe v. Rosser*, 1802, 3 East, 15; *Commings v. Heard*, 1869, L. R. 4 Q. B. 669. But see *Newall v. Elliot*, 1863, 32 L. J. Ex. 120. See, also, *Rhodes v. Airdale Drain. Com.*, 1876, L. R. 9 C. P. 508.

³ *Evans v. Rees*, 1839, 2 P. & D. 627; *R. v. Cotton*, 1813, 3 Camp. 444; *Wenman v. Mackenzie*, 1855, 25 L. J. Q. B. 44; ante, § 626.

⁴ *Brew v. Haren*, 1877, Ir. R. 11 C. L. 29.

⁵ *Bates v. Townley*, 1848, 19 L. J. Ex. 399.

⁶ *Keen v. Batshore*, 1794, 1 Esp. 194; commented on in *Bates v. Townley*, 1848, 19 L. J. Ex. 399.

⁷ 20 & 21 V. c. 77 (as amended by "The Statute Law Revision Act, 1892," or 55 & 56 V. c. 19); and 20 & 21 V. c. 79, Ir.

⁸ *Doe v. Calvert*, 1810, 2 Camp. 388.

⁹ *Id.*

¹⁰ *Allen v. Dundas*, 1789, 3 T. R. 125.

¹¹ 2 Camp. 390, n., citing *Anon. case*, 1810, coram Wood, B.

has to a great extent been remedied. The Court of Probate Act of 1857¹ provides² that where a will affecting real estate is proved in solemn form, or is otherwise the subject of a contentious proceeding in the Probate Division, the heir, devisees, and other persons interested in the real estate shall, as a general rule, be cited to see proceedings, or to become parties,³ and it also enacts,⁴ that "Where probate of such will is granted after such proof in solemn form, or where the validity of the will is otherwise declared by the decree or order in such contentious cause or matter as aforesaid, the probate, decree, or order respectively shall enure for the benefit of all persons interested in the real estate affected by such will, and the probate copy of such will, or the letters of administration with such will annexed, or a copy thereof respectively stamped with the seal of" [the Probate Division] "shall in all courts, and in all suits and proceedings affecting real estate of whatever tenure (save proceedings by way of appeal under this Act, or for the revocation of such probate or administration), be received as *conclusive evidence of the validity and contents of such will*, in like manner as a probate is received in evidence in matters relating to the personal estate; and where probate is refused or revoked on the ground of the invalidity of the will, or the invalidity of the will is otherwise declared by decree or order under this Act, such decree or order shall enure for the benefit of the heir-at-law or other persons, against whose interest in real estate such will might operate, and such will shall not be received in evidence in any suit or proceeding in relation to real estate, save in any proceeding by way of appeal from such decrees or orders." § 63⁵ empowers the Probate Division, at its discretion, to proceed in any case without citing the heir or other persons interested in real estate; but

§ 1759.

¹ 20 & 21 V. c. 77.

² By § 61. See, also, corresponding enactment in the Irish Act, 20 & 21 V. c. 79, § 65.

³ See Reg. 78 of Rules of 1862 for Court of Probate in contentious business, and Form No. 4. Although the heir-at-law may not have been cited in that capacity to see probate, nevertheless if he has been cited in some other capacity and appeared,

the probate will be conclusive evidence against him in a subsequent action relating to the real estate: *Beardsley v. Beardsley*, [1899] 1 Q. B. 746.

⁴ By § 62. See, also, corresponding enactment in the Irish Act, 20 & 21 V. c. 79, § 66.

⁵ See, also, 20 & 21 V. c. 79, § 67, Ir.

§§ 1759--- it provides that the probate, decree, or order of the court shall
1761. not affect any such person, "unless he has been cited or made party to the proceedings, or derives title under or through a person so cited or made party."

§ 1760. The same Act further provides,¹ that in any action "where, according to the existing law, it would be necessary to produce and prove an original will in order to establish a devise or other testamentary disposition of or affecting real estate, it shall be lawful for the party intending to establish in proof such devise or other testamentary disposition to give to the opposite party, *ten days* at least before the trial or other proceeding in which the said proof shall be intended to be adduced, *notice* that he intends, at the said trial or other proceeding, to give in evidence as proof of the devise or other testamentary disposition the *probate* of the said will, or the *letters of administration with the will annexed*, or a *copy thereof stamped with any seal of*" [the Probate Division]; "and in every such case such probate or letters of administration, or copy thereof respectively stamped as aforesaid, shall be *sufficient* evidence of such will and of its validity and contents, *notwithstanding the same may not have been proved in solemn form*, or have been otherwise declared valid in a contentious cause or matter, as herein provided, unless the party receiving such notice shall, within *four days* after such receipt, give *notice* that he disputes the validity of such devise or other testamentary disposition."

§ 1761. The notice required by the last cited enactment need not specify the purpose for which the evidence is wanted.² Next, though the Act directs that the notice shall be given "to the opposite party," that direction will be satisfied by giving it to his solicitor or agent; and, indeed, under ordinary circumstances,

¹ By § 64. By § 65, the presiding judge at the trial has power to direct by whom the costs of proof, under § 64, are to be borne. The corresponding provision to § 64 in the Irish Act is 20 & 21 V. c. 79, § 68, Ir., in which, however, the intervals allowed for giving notice are respectively *seven* and *three* days (instead of *ten* and *four* days, as in the

English Act). See, further, 14 & 15 V. c. 57, § 108, Ir., as to a somewhat similar practice in the Civil Bill Courts, excepting that no notice is required to be given; and *Jackson v. Jackson*, 1842, Ir. Cir. R. 469.

² *Cope v. Mooney*, 1862, 14 Ir. C. L. R. 256; *Irwin v. Callwell*, 1860, 12 Ir. C. L. R. 144.

this will be the more convenient course to pursue.¹ Thirdly, in stating that the probate shall be "sufficient evidence" of the will, the Legislature meant, that it shall be *prima facie*, as contradistinguished from conclusive, evidence.² Fourthly, the stamp mentioned in the Act is not required for the probate or letters of administration, but only for the copy of those documents;³ and lastly, notwithstanding the statute, a probate will not be evidence to prove the appointment of testamentary guardians.⁴

§§ 1761—
1763.

§ 1762. The admissibility and effect of orders made by the Local Government Board,⁵ on questions touching the settlement, removal, and chargeability of paupers is governed by the following enactment⁶:—"The guardians of any two unions or parishes, or the guardians of a union and the guardians of a parish, or the guardians of a union or parish and the overseers of any parish, or the overseers of any two parishes, between whom any question affecting the settlement, removal, or chargeability of any poor person shall arise, may, if they think fit so to do, by agreement in writing executed in respect of any guardians by sealing with their common seal, and in respect of overseers by the signatures of a majority of them, submit such question to the board for their decision; and the board may, if they see fit, entertain such question, and by an *order* under their *seal* determine the same; and every such order shall be in all courts, and for all purposes, final and conclusive between the parties submitting such question, as to the question therein determined."

§ 1763. An order adjudicating the amount of the stamp which a document ought to bear may be rendered conclusive by compliance with the following enactment. By the Stamp Act, 1891, the Commissioners of Inland Revenue may be required by any person to express their opinion with reference to any executed instrument as to whether it is chargeable with any stamp duty, and if so, with what amount.⁷ Persons dissatisfied with their

¹ *Barracclough v. Greenhough*, 1867, L. R. 2 Q. B. 1.

² *Id.*

³ *Rippon v. Priest*, 1863, 3 F. & F. 644.

⁴ *Cope v. Mooney*, 1862, 14 Ir. C. L. R. 256.

⁵ Constituted by 34 & 35 V. c. 70, § 2, out of what was formerly the Poor Law Board.

⁶ 14 & 15 V. c. 105 ("The Poor Law Amendment Act, 1851"), § 12.

⁷ See 54 & 55 V. c. 39, § 12.

§§ 1763—1765. decision may appeal to the High Court of that part of the kingdom where the case has arisen.¹ They must then impress upon the document a particular stamp, *denoting* either that no duty is chargeable, or that the proper duty has been paid; and in either event, the document so stamped “shall be admissible in evidence, and available for all purposes, notwithstanding any objection relating to duty.”² The adjudication of the commissioners under these provisions operates as a judgment in rem, and is conclusive on strangers as well as on parties, but must be pronounced before objection has been taken to the reception of the document in evidence.³

§ 1764. No precise rule can be laid down as to how far *judicial documents* will be evidence of the *facts recited* in them. This must, in each case, depend upon the language of the particular Act of Parliament under which the question arises.⁴

§ 1765. Proof of the existence of facts may be sometimes afforded by documents. Thus the production of a writ of *supersedeas* is sufficient evidence both of the issuing of the fiat against a bankrupt, and of the fact of such fiat having been superseded.⁵ A warrant of commitment, and a conviction,⁶ are each to a certain extent evidence of the facts recited therein; and if,

¹ See 54 & 55 V. c. 39, § 13.

² *Id.* § 12, sub-s. 5.

³ Prudential Mutual Assur. Assoc. v. Curzon, 1852, 22 L. J. Ex. 85.

⁴ For example, on the one hand, under § 26 of “The Trustee Act, 1893” (56 & 57 V. c. 53), a “vesting order” may, under certain circumstances, be made by the High Court for the purpose of conveying or assigning lands, or of releasing or disposing of contingent rights, such vesting orders being founded on allegations as to the incapacity, absence, survivorship, death, or intestacy of any trustee or mortgagee, and any vesting order made under the provisions of the Act, by § 32 of the same Act, has the same effect as if all necessary conveyances had been duly executed by all necessary parties. On the other hand, an order under § 43 of the old Irish “Incumbered Estates Act” (12 & 13 V. c. 77, Ir., now repealed by 38 &

39 V. c. 66), though, by § 49 of the former Act, it is *per se* conclusive evidence that the court have power to make it, that all necessary parties were present, that a proper petition was presented, and that due application was made, is no proof whatever either as to the title of parties stated in it to have been owners of the property (*Blake v. Jennings*, 1861, 12 Ir. C. L. R. 458), or of deeds, wills, or other documents executed therein: *Id.*

⁵ *Gervis v. Gd. West. Canal Co.* 1816, 5 M. & Selw. 76; *Wright v. Colls*, 1849, 19 L. J. C. P. 60. But apparently the existence of a warrant of attorney cannot be so proved as to render its production unnecessary merely by putting in a rule of court by which it is set aside: *Compton v. Chandless*, 1801, 4 Esp. 19 (*Ld. Kenyon*). And see *Yorke v. Brown*, 1842, 11 L. J. Ex. 410.

⁶ *Ante*, §§ 1669 et seq.

therefore, in an action against a justice for false imprisonment, §§ 1765—
either be put in by the plaintiff reciting the information on oath 1767.
on which it purports to have been founded, such recital will
relieve the defendant from the necessity of formally proving the
information.¹

§ 1766. The existence alike of the judgment on which it was founded, and of the action in which such judgment was recovered, are, in cases in which the judgment debtor sues the sheriff, sufficiently proved by the production of the writ of *fi. fa.*, and the sheriff may in such an action justify under such writ; but if the action be brought by a stranger, both the writ and the judgment must be proved.² The rule applies as well to a case where the vendee of the sheriff is a party, as where it is the sheriff himself, and where he is plaintiff as well as where he is defendant.³ It, however, possibly may not apply where the execution creditor is himself the purchaser from the sheriff.⁴

§ 1767. Inquisitions are generally admissible as *prima facie* evidence of the facts stated in them. This admissibility rests upon the ground that they contain the result of inquiries made under competent authority, concerning matters in which the public is interested.⁵ As such, they are receivable even against strangers, though, as before observed, they are far from being conclusive evidence;⁶ thus a survey and report made by a surveyor in discharge of a duty imposed upon him by statute,⁷ and a survey of a manor taken in pursuance of a royal commission⁸ are admissible documents of this nature. These documents, since the abolition of writs of right, and the passing of the modern statutes of limitation, have become of much less importance as evidence than they formerly were, but still are occasionally of value, especially in matters of

¹ *Haylock v. Sparke*, 1853, 22 L. J. M. C. 67, seemingly overruling *Stevens v. Clark*, 1842, 2 M. & Rob. 435. See ante, § 728.

² *Doe v. Murless*, 1817, 6 M. & Selw. 110. The reason for this distinction seems to be, that in the former case, the plaintiff, having been a party to the original action, must be aware of the existence of the judgment, and might have moved to set it aside, if it be open to objection :

Id.

³ *Doe v. Murless*, 1817, 6 M. & Selw. 110; ante, § 729.

⁴ *Doe v. Smith*, 1817, 2 Stark. R. 199.

⁵ 2 Ph. Ev. 125.

⁶ *Tooker v. Beaufort*, 1757, 1 Burr. 146; ante, § 1674.

⁷ *Evans v. Merthyr Tydfil Urban Council*, [1899] 1 Ch. 241.

⁸ *Blandy-Jenkins v. Dunraven*, 1899, 62 J. P. 661 (Byrne, J.).

§§ 1767—
1769. pedigree,¹ in questions respecting the right of church patronage, or the existence or amount of a modus, and in peerage claims.

§ 1768. Among the most important of inquisitions is *Domesday-book*.² This is the most ancient inquisition extant, and was compiled a few years after the Conquest by commissioners, styled the Justiciaries of the King, upon the oaths of the sheriffs, the lords of the manors, the presbyters of every church, the reves of every hundred, and the bailiffs and six villans of every village. It contains a general survey of all the counties of England, except the four northern, and specifies the name and local position of each place; its possessor in the time of King Edward the Confessor; its possessor at the time of the survey; how many hides in the manor; how many carrucates in demesne; how many homagers, cotarii, servi, freemen, and tenants in socage; what quantity of wood, meadow, and pasture; what mills and fish-ponds; what the gross value in King Edward's time, and at the time of the survey; and how much each freeman or sockman had at these respective periods.³ It is not often available as practical evidence, owing to the frequent changes of name which the hundreds and other places described in it have undergone since the eleventh century;⁴ though this defect has, to a certain extent, been remedied by the learned labours of our antiquaries.

§ 1769. Other inquisitions which are admissible in evidence to support or defeat peerage claims, or other claims founded on pedigrees,⁵ are the Visitation Books, deposited at the Heralds' College. They contain the pedigrees and coats of arms of the nobility and principal gentry in England, and were compiled during the 16th and 17th centuries by heralds, acting under commissions from the Crown.⁶ Occasionally the House of Lords has required the production of the commission under which the visitation was

¹ See *De Roos Peer.*, 1805, 2 Coop. 345 (H. L.).

² Now deposited in the Record Office. See ante, § 1485, n. As to the mode of proving entries therein, see ante, § 1533.

³ Those who wish for further information on this subject are referred to Sir H. Ellis's *Intro. to Domesday*, in two vols.; Ingulphus, ed. Gale, pp. 79, 80; Brady, *Hist. of Eng.* 205—208; Miss Strickland's

Lives of Queens of England, vol. i. pp. 91—93.

⁴ Sir A. Ellis's *Intro.* vol. i. p. 34.

⁵ *Matthews v. Port*, 1687, Comb. 63; *Pitton v. Walter*, 1719, 1 Str. 162; *Leigh Peer.*, 1829, H. L. part 2, 138; *De Lisle Peer.*, 1826, H. L. Min. Ev. 12; *Tracy Peer.*, 1830, H. L., Min. Ev. 18.

⁶ *Hubb. Ev. of Suc.* 541, 542. See ante, § 567.

made.¹ Copies of these visitations have, moreover, been uniformly rejected;² though it is difficult to see on what ground, if the originals can be regarded as public official documents.³

§§ 1769—
1770a.

§ 1769A. To render inquisitions, reports, surveys, and other similar documents admissible in evidence as *public documents*, it must appear they were made for the purpose of the public making use of them and being able to refer to them, for the fact that the public are interested in the documents, and are in a position to challenge or dispute them, if inaccurate, invests them with a certain amount of authority,⁴ therefore confidential reports made to the Sovereign would not be admissible as public documents,⁵ neither would War Office plans, nor plans and reports made to the Board of Trade, nor reports of surveyors to the Lord Warden of the Cinque Ports, nor estimates made by the King's engineer for the reparation of Walmer Castle.⁶ For similar reasons the report of a committee appointed by a public department in a foreign State, though addressed to that department and acted on by the Government, is not necessarily admissible in the courts here, as evidence of the facts stated therein.⁷

§ 1770. In Ireland, the Down Survey, which was made during the reign of Charles II., is by statute⁸ rendered conclusive as to the boundaries of what are called "the old and new interests,"—that is, of the lands apportioned between the aboriginal inhabitants of Ireland and the English and Scotch settlers. It is also admissible in evidence as a public document on all questions between any persons respecting the matters stated in it.⁹

§ 1770A. The Books of Distributions, too, though they are only abstracts of the survey mentioned in the last paragraph, will be received in evidence, as having been compiled under public

¹ Hubb. Ev. of Suc. 546 et seq., and cases there cited. See, also, *Shrewsbury Peer.*, 1857, 7 H. L. C. 1.

² *Matthews v. Port*, 1687, Comb. 63; *Ld. Thanet v. Forster*, 1683, T. Jones, 224; Hubb. Ev. of Suc. 548.

³ See ante, §§ 1598, 1599. As to the admissibility of other books kept at the *Heralds' College*, see Hubb. Ev. of Suc. 538—566.

⁴ See *Ld. Blackburn in Sturla v. Freccia*, 1880, 5 A. C. 623 at pp. 643-4, and *Farwell, J.*, in *Mercer*

v. Denne, [1904] 2 Ch. 534 at p. 541.

⁵ *Ld. Blackburn in Sturla v. Freccia*, supra.

⁶ *Mercer v. Denne*, supra.

⁷ *Sturla v. Freccia*, 1880, 5 App. Cas. 623, which deserves attention as containing able judgments on an interesting branch of law.

⁸ 14 & 15 C. 2, c. 2, Ir.; 17 & 18 C. 2, c. 2, § 5, Ir.

⁹ *Abp. of Dublin v. Ld. Trimleston*, 1849, 12 Ir. Eq. R. 251; *Tisdall v. Parnell*, 1863, 14 Ir. C. L. R. 1.

§§ 1770a
—1771.

authority, and being preserved among the records of a public office.¹

§ 1770b. A tithe map is admissible as a public document in evidence of any matter within the scope and purview of the authority of the Commissioners who made it.² But the Irish Ordnance Survey, though notoriously drawn up with great care and accuracy, is, like the English one, not regarded by the courts of law as a public document, and it is consequently inadmissible.³ Still, though not evidence of title, it may sometimes be admissible on other questions—such, for example, as disputes as to boundary.⁴

§ 1770c. Moreover, all surveys and maps, even when they cannot be treated as public documents, will occasionally be received in evidence, as admissions of persons in privity with those against whom they are tendered.⁵

§ 1771. In Ireland every order made by the Lord Lieutenant and Council under any of the modern statutes for defining the boundaries of Irish counties, and other divisions and denominations of land, is in itself “conclusive evidence of every fact and circumstance necessary to authorise the making thereof,” and must be taken to have been made in conformity with the provisions of the Acts.⁶ It may be conclusively proved, as may also any map referred to therein,⁷ by any copy “purporting to be certified as a true copy” by the clerk of the Privy Council, or it may be proved by a printed copy published in the Dublin Gazette.⁷ A copy, too, of any map referred to in any such order, or of any part of such map, purporting to be certified as a true copy by such clerk, is conclusive evidence of the original map or the part thereof of which it purports to be a copy.⁸

¹ *Poole v. Griffith*, 1865, 15 Ir. C. L. R. 239; confirming *Knox v. Ld. Mayo*, 1858, 7 Ir. Ch. R. 563; and *Spaight v. Twiss*, 1868, 13 Ir. C. L. R. 416; and overruling on this point *Abp. of Dublin v. Ld. Trimleston*, 1849, 12 Ir. Eq. R. 251; which see generally, as to the admissibility of decrees of the Court of Claims.

² *Att.-Gen. v. Antrobus*, [1905] 2 Ch. 188.

³ As to the Irish Survey, see *Swift v. M'Tiernan*, 1848, 11 Ir. Eq. R. 602; *Tisdall v. Parnell*, 1863, 14 Ir. C. L. R. 1; as to English Ordnance

Survey, see *Bidder v. Bridges*, 1885, 54 L. T. 529 (Kay, J.); also, *Beaufort (Duke of) v. Smith*, 1849, 19 L. J. Ex. 97, as to a Public Survey by order of Cromwell.

⁴ *Caton v. Hamilton*, 1889, 53 J. P. 504.

⁵ *Earl v. Lewis*, 1801, 4 Esp. 1; *Pollard v. Scott*, 1790, Peake, R. 19; *Wakeman v. West*, 1836, 7 C. & P. 479; *Doe v. Lakin*, 1836, 7 C. & P. 481.

⁶ 35 & 36 V. c. 48 (“The County Boundaries (Ireland) Act, 1872”), § 2.

⁷ *Id.* § 4.

⁸ *Id.* § 3.

§ 1772. Old ecclesiastical *terriers* are returns of the temporal possessions of the Church in every parish, made from time to time by virtue of the 87th canon, and deposited in the bishop's registry, or the registry of the archdeacon of the diocese, or, occasionally, in the chest of the parish church. Such "*terriers*" are receivable in evidence, when proved to have come from the proper repository.¹ Their admissibility rests partly upon the official character of the statements they contain, but principally, upon the ground that they are admissions by persons who stood in privity with the litigants.³

§ 1772A. Returns made by the incumbents of livings in answer to queries sent to them by the bishop of the diocese, for the information of the Governors of Queen Anne's Bounty, are also admissible in evidence, on the same principle as inquisitions, where the question relates to the rights of the Church.³

§ 1773. Copies of Court Rolls, and especially presentments of manor courts, are,—as already pointed out,⁴—admissible in evidence, to prove either the customs or bounds of a manor, or any other matters of public and general interest connected with a manor, which are capable of being proved by evidence of reputation. Moreover, copies of court rolls, purporting to be surrenders of property by a person proved to be then in possession, and admittances accordingly, will, in an action by the surrenderee wherein his ownership is disputed, be good evidence of the existence of the manor, and of such property being within it.⁵ As between surrenderor and surrenderee, a presentment of an admittance upon a surrender out of court is primary evidence of the surrenderee's title, without producing the original surrender.⁶

§ 1774.⁷ The principles on which *official registers* are admitted as evidence to prove the principal fact which they record, *e.g.*, a marriage or a death, have already been explained.⁸ But they

¹ 1 St. Ev. 238, 239; B. N. P. 248. The repository need not be the *most proper* place of deposit. See, ante, §§ 659 et seq., and Croughton v. Blake, 1843, 13 L. J. Ex. 78.

² 2 Ph. Ev. 120.

³ Carr v. Mostyn, 1850, 19 L. J. Ex. 249.

⁴ Ante, § 623; and see also §§ 612, 613.

⁵ Standen v. Christmas, 1847, 16 L. J. Q. B. 265.

⁶ Doe v. Olley, 1840, 12 A. & E. 481. See, also, Doe v. Hall, 1812, 16 East, 208; Doe v. Mee, 1833, 4 B. & Ad. 617; R. v. Thurscross, 1834, 1 A. & E. 126.

⁷ Gr. Ev. § 493, in some part.

⁸ Ante, § 1591.

§§ 1774,
1775.

are also admissible as competent evidence of other facts only where such facts are required by law to be recorded in them for the public benefit, and are necessarily within the knowledge of the registering officer.¹ Thus, on the one hand, a marriage register is evidence, not only of the fact of the marriage, but of the time of its celebration; for both these facts must have been known to the clergyman making the entry, and it was his duty to state them correctly in the register.² But, on the other hand, a register of baptism while evidence of that fact, and of its date, furnishes, even if it state the date of his birth, no proof of the age of the party, further than that the person to whom it relates was born at the date of the ceremony;³ neither, taken per se, is it any evidence of the place where the child was born—although, if other circumstances be proved, as that the child at the time of baptism was very young, or had since been removed to the parish where the register was kept, or relieved by such parish while living beyond its limits, it may then, in connexion with these facts, afford presumptive evidence of the place of birth.⁴ In one case, however, it is said that a register may be slight proof of a collateral fact mentioned in it. For if the register contains a statement that the child was illegitimate, it seems that it may be read as *some* proof of that fact, being regarded as evidence of the reputation in the parish.⁵

§ 1775. Registers of births and deaths, under the Births and Deaths Registration Act, 1836,⁶ as amended by the Births and Deaths Registration Act, 1874,⁷ are not admissible in evidence at

¹ *Lyell v. Kennedy*, 1884, 27 Ch. D. 1 (C. A.).

² *Doe v. Barnes*, 1834, 1 M. & Rob. 386. As to certified copies of it under seal of General Registry Office being evidence, see 6 & 7 W. 4, c. 86, § 38, cited ante, § 1601, n., title "Birth, &c. Registers"; *R. v. Hawes*, 1847, 1 Den. C. C. 270. As to Quaker marriages, see 35 & 36 V. c. 10 ("The Marriage (Society of Friends) Act, 1872").

³ *Ryan v. Ring*, 1890, 25 L. R. Ir. 184; *Glenister v. Harding*. In re *Turner*, 1885, 29 Ch. D. 985; *R. v. Clapham*, 1829, 4 C. & P. 29; *Burg-hart v. Angerstein*, 1834, 6 C. & P. 690; *Whien v. Law*, 1821, 3 Stark.

R. 63.

⁴ *R. v. North Petherton*, 1826, 5 B. & C. 508; *R. v. Lubbenham*, 1834, 5 B. & Ad. 968; *R. v. St. Katharine*, 1831, 5 B. & Ad. 970, n. See *R. v. Crediton*, 1858, 27 L. J. M. C. 265.

⁵ *Cope v. Cope*, 1833, 5 C. & P. 604.

⁶ 6 & 7 W. 4, c. 86, § 38, cited ante, § 1601, n., under title "Birth, &c. Registers."

⁷ 37 & 38 V. c. 88, § 38, enacts, that "an entry or certified copy of an entry of a birth or death in a register under 'The Births and Deaths Registration Acts, 1836 to 1874,' or in a certified copy of such

all, unless the entries purport to be signed in accordance with the prescribed rules. On proof, however, that the requirements of the Acts have been duly complied with, the entries, or certified copies of them, become evidence,¹ not only of the births² and deaths to which they relate, but of the place where these events occurred, whenever by the direction of the Registrar-General that fact has been added to the entry;³ but the register books kept under the Registration of Burials Act, 1864, are simply "evidence of the burials entered therein."⁴

§§ 1775,
1775a.

§ 1775A. The Register of Patents,⁵—which is kept at the Patent

a register, shall not be evidence of such birth or death, unless such entry either purports to be signed by some person professing to be the informant, and to be such a person as is required by law at the date of such entry to give to the registrar information concerning such birth or death, or purports to be made upon a certificate from a coroner, or in pursuance of the provisions of this Act with respect to the registration of births and deaths at sea. When more than three months have intervened between the day of the birth and the day of the registration of the birth of any child, the entry or certified copy of the entry, made after the commencement of this Act, of the birth of such child in a register under 'The Births and Deaths Registration Acts, 1836 to 1874,' or in a certified copy of such a register, shall not be evidence of such birth, unless such entry purports, (a) if it appear that not more than twelve months have so intervened, to be signed by the superintendent registrar as well as by the registrar; or, (b) if more than twelve months have so intervened, to have been made with the authority of the Registrar-General, and in accordance with the prescribed rules. Where more than twelve months have intervened between the day of a death or the finding of a dead body and the day of the registration of the death or the finding of such body, the entry or certified copy of the entry, made after the commencement of this Act, of a death in a register under 'The Births and Deaths Re-

gistration Acts, 1836 to 1874,' or in a certified copy of such register, shall not be evidence of such death, unless such entry purports to have been made with the authority of the Registrar-General, and in accordance with the prescribed rules."

¹ A certificate of death is sufficient evidence of a death, without a certificate of burial also: *Re Vater's Trust*, 1887, W. N. 128.

² In *Re Wintle*, 1870, L. R. 9 Eq. 373, *Id. Romilly* is reported to decide that a birth register is not evidence of the date of birth. This case has, however, been recently disapproved by Sir Francis Jeune, P. (In *re Goodrich* [1904] P. 138), and is probably not law.

³ By 7 W. 4 & 1 V. c. 22 ("The Births and Deaths Registration Act, 1837"), § 8, "it shall be lawful for the Registrar-General, if he shall think fit, to direct that the place of birth or death of any person, whose birth or death shall be registered under the said Act for registering births, deaths, and marriages, shall be added to the entry, in such manner as the Registrar-General shall direct; and such addition, when so made, shall be taken to all intents to be part of the entry in the register."

⁴ 27 & 28 V. c. 97, § 5.

⁵ By § 114 thereof, registers of patents and proprietors, or of designs and trade marks, kept under any enactment repealed by "The Patents, Designs, and Trade Marks Act, 1883," are to be deemed part of the register kept under that Act (46 & 47 V. c. 57).

§§ 1775a —1776. Office, and which contains "the names and addresses of grantees of patents, notifications of assignments and of transmissions of patents, of licenses under patents, and of amendments, extensions and revocations of patents, and such other matters affecting the validity or proprietorship of patents as may from time to time be prescribed,"—is *prima facie* evidence of any matters by the Patents, Designs, and Trade Marks Act, 1883,¹ directed or authorised to be inserted therein.²

§ 1775B. The law is the same as to the Register of Designs, and the Register of Trade Marks,¹ which are respectively kept in the same office;³ and the Trade Marks Act, 1905, provides, that the registration of a person as proprietor of such a mark shall be *prima facie* evidence, and, after seven years, be conclusive evidence, of the validity of the original registration and of all subsequent assignments.⁴ The Registers of Copyrights kept in the Hall of the Stationers' Company under the Copyright Acts are rendered *prima facie* proof of the proprietorship or assignment of copyright and of licenses affecting the copyright entered in the registers, and in the case of dramatic and musical pieces, they afford *prima facie* proof of the right of representation or performance.⁵

§ 1776. Registers required by law to be kept are in all cases (as well as in the case of baptism and other registers),⁶ evidence of the facts required to be recorded in them, but not of facts voluntarily also recorded therein. In accordance with this principle, the time of a prisoner's committal or discharge⁷ may be proved by the daily books of a public prison, but the cause of his commitment cannot be so proved;⁸ the time of a vessel's sailing, and the general movements of the fleet of which it forms part, may be *prima facie* proved⁹ by the log-book of a convoy man-of-war, transferred from the Admiralty to the Record Office;¹⁰

¹ 46 & 47 V. c. 57, amended by 48 & 49 V. c. 63.

² *Id.* § 23.

³ *Id.* § 55; 5 Ed. 7, c. 15, § 4.

⁴ 5 Ed. 7, c. 15, § 38.

⁵ 5 & 6 V. c. 45 ("The Copyright Act, 1842"), §§ 11, 20, and 7 & 8 V. c. 12 ("The International Copyright Act, 1844"), § 8, and 25 & 26 V. c. 68 ("The Fine Arts Copyright Act,

1862"), §§ 4, 5.

⁶ *Supra*, § 1774.

⁷ *R. v. Aickles*, 1784, 1 *Lea* 191.

⁸ *Salte v. Thomas*, 1802, 3 B. & P. 188.

⁹ *D'Israeli v. Jowett*, 1795, 1 *Esp.* 427; *Watson v. King*, 1815, 4 *Camp.* 275.

¹⁰ See *ante*, § 1485, n.

the books of the Sick and Hurt Office, and the muster-books of the Navy Office (now under the custody of the Master of the Rolls),¹ are admissible to prove the death of a sailor, and the time when it occurred,² and the latter books may also be read to show what ship the sailor belonged to, and the amount of wages due to him;³ and lighthouse journals are admitted by the Court of Admiralty to prove the state of the wind and weather as registered therein.⁴ In all cases like the above, the register does not prove the identity of the parties there named with the parties in question; but that fact must be established by other proof, though slight evidence will in most cases suffice.⁵

§§ 1776,
1777.

§ 1777. On the same broad principle that registers required by law to be kept are *prima facie* evidence of the facts which the law says shall be recorded in them, land tax assessments are admissible, to prove the assessment of the taxes upon the individuals and for the property therein mentioned; and perhaps, taken in connection with other facts, are some evidence of occupation or seisin.⁶ Again, as to the *value* of property—the valuation lists of property in the Metropolis are for many purposes conclusive, and they are also taken as showing that all requisite hereditaments have been inserted;⁷ poor law valuations in Ireland have also been received on one or two occasions as some evidence on the point,⁸ and are now by statute sufficient proof of the “annual value” of such lands in all cases in which that question may be raised before the Civil Bill Court.⁹ Under the Representation of the People Act, 1867, the rate-book has

¹ See ante, 1485, n.

² *Wallace v. Cook*, 1804, 5 Esp. 117; *R. v. Rhodes*, 1742, 1 Lea. 24; *Barber v. Holmes*, 1800, 3 Esp. 190. See *Heathcote's Divorce*, 1851, 1 Macq. 277 (H. L.), where the Lords required other evidence than a log-book to prove that an officer of a ship was at a certain place at a given time.

³ *R. v. Fitzgerald*, 1741, 1 Lea. 20; *R. v. Rhodes*, 1742, 1 Lea. 24.

⁴ *The Maria das Dores*, 1863, 32 L. J. P. & M. 163.

⁵ *Birt v. Barlow*, 1779, 1 Doug. 170; *Bain v. Mason*, 1824, 1 C. & P. 202; *Barber v. Holmes*, 1800, 3 Esp.

190; *Wedgwood's case*, 1831, 8 Greenl. 75 (Am.).

⁶ *Smith v. Andrews*, [1891] 2 Ch. 678; *Doe v. Seaton*, 1834, 2 A. & E. 178; *Doe v. Arkwright*, 1833, 5 C. & P. 575; *Doe v. Cartwright*, 1824, R. & M. 62; *Ronkendorff v. Taylor*, 1830, 4 Pet. 349 (Am.).

⁷ 32 & 33 V. c. 67, § 45. See, also, “The Local Government Act, 1888” (51 & 52 V. c. 41).

⁸ *Swift v. M'Tiernan*, 1848, 11 Ir. Eq. R. 602; *Welland v. Ld. Middleton*, 1844, 11 Ir. Eq. R. 603. See 23 & 24 V. c. 4, § 9, Ir., ante, § 1063, n.

⁹ See 40 & 41 V. c. 56, §§ 31, 32.

**§§ 1777,
1777a.**

been held to be some, but not conclusive, evidence of the "rateable value" of premises sufficient to qualify an occupier to be registered as a voter;¹ the rate-books of an Irish poor-law union are *prima facie*, but not conclusive, evidence of the liability of a person rated therein as immediate lessor;² the books of the Bank of England are admissible, and indeed the best evidence, to prove the transfer of stock;³ the books kept formerly by the Metropolitan Board of Works and now by the London County Council for consolidated stock,⁴ and the registers kept in pursuance of the Colonial Stock Act, 1877,⁵ are respectively evidence of all matters therein severally entered, and of the title of the owners of any such stock; some of the official documents relating to parliamentary or municipal elections are, under specified restrictions, rendered, by the Ballot Act, 1872, admissible in evidence of certain particulars;⁶ an entry in a vestry-book, stating the election of a treasurer of the parish at a vestry duly held in pursuance of notice, is evidence of the election, and of its regularity;⁷ and an old entry in the vestry-book, signed by the churchwardens, stating that a pew claimed in right of a messuage had been repaired by a former owner of the messuage, in consideration of his using it, has been held to be evidence in support of the plaintiff's right, as owner of such messuage, when made by the churchwardens within the scope of their official authority.⁸

§ 1777A. On the other hand, in accordance with the principle that voluntary entries in a register, as to matters which the law does not require to be recorded there, are *not* evidence, old entries in a vestry-book, made by a churchwarden apparently not in the discharge of any public duty, and by which he has not charged himself, have been rejected.⁹

¹ *Cooke v. Butler*, 1872, 2 Hop. & Colt. 22.

² *Castlebar Guardians v. Ld. Lucan*, 1849, 13 Ir. L. R. 44.

³ *Breton v. Cope*, 1791, Peake, R. 30; *Marsh v. Colnett*, 1798, 2 Esp. 665.

⁴ 32 & 33 V. c. 102, § 13; 51 & 52 V. c. 41, § 40.

⁵ 40 & 41 V. c. 59, § 17.

⁶ 35 & 36 V. c. 33, Sched. 1, Part 1, rr. 38—43, and Part 2, r. 64.

See *R. v. Beardsall*, 1876, 1 Q. B. D. 452.

⁷ *R. v. Martin*, 1809, 2 Camp. 100; *Hartley v. Cook*, 1832, 5 C. & P. 441.

⁸ *Price v. Littlewood*, 1812, 3 Camp. 288; questioned, however, in House of Lords (*Ld. Blackburn*): *Sturla v. Freccia*, 1880, 5 App. Cas. 623.

⁹ *Cooke v. Banks*, 1826, 2 C. & P. 478.

§§ 1778—80. Besides the instances given above, the Legislature has on many occasions interposed, and expressly made official registers evidence.¹ §§ 1778—1780.

¹ For instance, "*The Companies Act, 1862*" (25 & 26 V. c. 89), § 37, makes registers of members kept in pursuance thereof prima facie evidence of any matters by that Act directed or authorised to be inserted therein: that is, among other particulars, of the names, addresses, and occupations of the members,—of the shares or amount of stock held by each member, distinguishing each share by its number,—of the amount paid, or agreed to be considered as paid, on the shares of each member, of the date at which the name of any person was entered in the register as a member, and of the date at which any person ceased to be a member (see §§ 25, 29). "*The Country Bankers Act, 1826*" (7 G. 4, c. 46, §§ 4, 6; ante, § 1601, n., title "Banking Co-partnerships"), makes certified copies of the memorials filed at the office of Inland Revenue by banking co-partnerships receivable in evidence, "as proof of the appointment and authority of the public officers named in such account or return, and also of the fact, that all persons named therein as members of such corporation or co-partnership, were members thereof at the date of such account or return"; though if these memorials have not been filed within the time limited by the Act, they cannot be received in evidence (*Prescott v. Buffery*, 1845, 1 C. B. 41), and when they are admissible, they by no means preclude parties from having recourse to other proof of the facts contained in them (*Edwards v. Buchanan*, 1832, 3 B. & Ad. 788; *R. v. Carter*, 1845, 1 Den. C. C. 65). Under "*The Diseases of Animals Act, 1894*" (57 & 58 V. c. 57), § 10, sub-s. 5, "An order of the board or of a local authority declaring a place to be an infected place or area, or declaring a place or area, or a portion of an area, to be free from disease, or cancelling a declaration, shall be conclusive evidence to all intents of the existence or past existence or cessation of the

disease, or of the error, or of any other matter whereon the order proceeds." "*The Local Loans Act, 1875*" (38 & 39 V. c. 83), §§ 23, 24, renders the registers of nominal securities, which are provable by certified copies or extracts, "evidence of any matters authorised to be inserted therein." So, under "*The London Hackney Carriages Act, 1843*" (6 & 7 V. c. 86, § 16, cited ante, § 1601, n., title "Public Conveyances." See, also, 16 & 17 V. c. 112, § 12, Ir.), registers of licenses granted in respect of metropolitan public carriages appear to be sufficient proof of all things therein contained. "*The Merchant Shipping Act, 1894*" (57 & 58 V. c. 60), § 64, makes every register of a British ship, and every examined or certified copy of such a register and endorsements thereon, and every declaration made thereunder, as to a British ship, receivable in evidence as prima facie proof of all matters contained or recited therein (see *Myers v. Willis*, 1856, 25 L. J. C. P. 39, 255; *The Princess Charlotte*, 1863, Brown. & L. 75; and, also, *Leary v. Lloyd*, 1860, 29 L. J. M. C. 194), and consequently, of the fact that the ship registered is a British vessel (*R. v. Bjornsen*, 1865, 34 L. J. M. C. 180), and of the ownership of such vessel (*Hibbs v. Ross*, 1866, L. R. 1 Q. B. 534), and under § 239, sub-s. 6, all entries made in any official log-book, as directed by the same Act, are receivable in evidence (see §§ 239, 241 of the Act; also *The Henry Coxon*, 1878, 3 P. D. 156). "*The Oyster Fishery (Ireland) Amendment Act, 1866*" (29 & 30 V. c. 97, § 12, Ir.; see, also, "*The Fisheries (Ireland) Act, 1869*" (32 & 33 V. c. 92, Ir.)), § 14, makes a licence granted for the formation of an oyster bed, certified under the hand of the clerk of the peace, with whom the original is lodged, evidence that such licence was duly granted, and that all preliminary matters were rightly performed. So, in certain proceedings under "*The Sea Fisheries Acts,*

§ 1781.

§ 1781. The admissibility of the *books of corporations* depends, at common law, on the nature of the acts recorded. If these are obviously of a public character, and the entries have been made by the proper officer, they will be received in evidence either for or against the corporations; but if they relate to the private transactions of the corporate body, they will be inadmissible, except, perhaps, in actions between their own members.² At common law, these books, whatever be the nature of the entries, can seldom be adduced by the corporation, in support of its own claims against a stranger,³ but such books are, however, frequently rendered admissible by statute. Thus, under the Companies Act, 1862,⁴ the minutes of all resolutions and proceedings of general meetings of companies registered under the Act, and of the directors or managers of such companies, provided they purport to be signed, either by the presiding chairman, or by the chairman of the next succeeding meeting, are *prima facie* evidence, not only of the facts therein entered, but of the meetings having been duly held and convened. Another section⁵ of the same Act enacts, that "where any company is being wound up, all books, accounts, and documents of the company, and of the liquidators [appointed under the Act], shall, as between the contributories of the company, be *prima facie* evidence of the truth of all matters purporting to be therein recorded."⁶ So under "The Companies Clauses Consolidation Act, 1845,"⁷ the registers of shareholders in companies, subject to the provisions of that Act, furnish *prima facie* evidence of the defendant being a shareholder, and of the number and amount

1868 and 1883" (31 & 32 V. c. 45; 46 & 47 V. c. 22), it is enacted by "The Merchant Shipping Act, 1894" (57 & 58 V. c. 60), §§ 373, 374, that the register of sea-fishing boats "shall be conclusive evidence that the persons entered therein at any date as owners of the boat were at that date owners thereof, and that the boat is a British sea-fishing boat."

¹ R. v. Mothersell, 1718, 1 Str. 93; Thetford's case, 1707, 2 Camp. 101 n.

² Marriage v. Lawrence, 1819, 3 B. & Ald. 144; Gibbon's case, 1734

17 How. St. Tr. 810.

³ London v. Lynn, 1789, 1 H. Bl. 214; Corp. of Waterford v. Price, 1846, 9 Ir. L. R. 310; Com. v. Woelper, 1817, 3 Serg. & R. 29 (Am.); Highland Turnp. Co. v. McKean, 1813, 10 Johns. 154 (Am.).

⁴ 25 & 26 V. c. 89, § 67, cited ante. §§ 1596-7, n., under title "Books of Companies."

⁵ 25 & 26 V. c. 86, § 154.

⁶ See, also, Fox's case, Re Mosely Green Coal and Coke Co., Lim., 1868, 3 De G. J. & S. 465.

⁷ 8 & 9 V. c. 16, § 28.

of his shares, in all actions for calls brought by the company.¹ "The Elementary Education Act, 1870," contains provisions² with respect to the minutes of meetings held by a school board under that statute similar to those contained in the section of the Companies Act, 1862, first referred to above. Besides the examples given above, there are a great variety of semi-public books and documents, the admissibility and effect of which depend upon special legislative enactment, the most important of which have already been incidentally noticed while discussing the mode of proving public documents. Parliament having in all such instances as these, disregarded the common-law rule, which prohibits a man from producing his own books as evidence for himself, the courts will take care, before they permit a company to avail itself of such an exceptional privilege, that the provisions of the statute conferring the privilege have been strictly complied with.³

§§ 1781;
1782.

§ 1782. The *mode of signing books* which contain entries of the proceedings of commissioners, directors of companies, public trustees, and the like, at their general meetings, must now be considered. By a great variety of statutes, such books are rendered admissible as evidence of the proceedings entered in them, and, in general, even an unsigned minute of proceedings under the charters, &c., of incorporation of a society will, if produced from the proper custody, be admissible in evidence.⁴ Even in a penal action, the minute book of a vestry, which has been kept in accordance with the provisions of the Metropolis Local Management Act,⁵ is, at all events when coupled with its attendance book, good evidence; ⁶ but it not unfrequently happens that the Act contains a clause directing the chairman to subscribe his name to the minutes at each meeting. Notwithstanding this

¹ See *Waterford Rail. Co. v. Wolsely*, 1851, 1 Ir. C. L. R. 444.

² 33 & 34 V. c. 75, § 30, sub-s. 4.

³ *Bain v. Whitehaven, &c. Rail. Co.*, 1850, 3 H. L. C. 19 (Ld. Brougham); *Birkenhead Rail. Co. v. Brownrigg*, 1849, 19 L. J. Ex. 27; *Lond. & N. W. Rail. Co. v. McMichael*, 1850, 5 Ex. 855; *West Cornwall Rail. Co. v. Mowatt*, 1850, 19 L. J. Q. B. 478. See *Inglis v. Gt.*

North. Rail. Co., 1852, 1 Macq. 112, H. L.; *Waterford, Wexf. Wickl. & Dubl. Rail. Co. v. Pidcock*, 1853, 22 L. J. Ex. 146.

⁴ *Lauderdale Peer. case*, 1885, 10 App. Cas. 692 (H. L.).

⁵ Contained in § 60, of 18 & 19 V. c. 120.

⁶ *Hemmings v. Williamson*, 1883, 10 Q. B. D. 459 (C. A.).

**§§ 1782—
1784.**

clause, the courts have held, that the fact of the signature being attached *at the meeting*, is not a condition precedent to the admissibility of the entry, provided it has been signed at some future time by the person who actually presided as chairman.¹ This ruling has at least the advantage of being highly convenient, and (probably for this reason) was, in 1873, and again in 1892, almost entirely adopted by the Legislature, in the enactments respectively passed for facilitating the proof of proceedings of Municipal Corporations.²

§ 1783. The last-mentioned Act enacts,³ that “a minute of proceedings at a meeting of the council, or of a committee, signed at the same or *the next* ensuing meeting, by the mayor, or by a member of the council, or of the committee, describing himself as, or appearing to be, chairman of the meeting at which the minute is signed, shall be received in evidence without further proof;” and it further enacts,⁴ that until “the contrary is proved, every meeting of the council or of a committee, in respect of the proceedings whereof a minute has been so made, shall be deemed to have been duly convened and held, and all the members of the meeting shall be deemed to have been duly qualified; and, where the proceedings are proceedings of a committee the committee shall be deemed to have been duly constituted, and to have had power to deal with the matters referred to in the minutes.” The Public Health Act, 1875, contains two similar clauses, and extends this facility of proof, not only to minutes of proceedings at meetings of local boards, committees, or joint boards, but to “*copies of any orders made or resolutions passed*” at such meetings.⁵

§ 1784. While treating of the mode of proving certificates,

¹ *Southampton Dock Co. v. Richards*, 1840, 1 M. & Gr. 448; *Miles v. Bough*, 1842; In re *Jennings*, 1851, 1 Ir. Ch. R. 236. See 33 & 34 V. c. 75, § 30, sub-s. 4. See, also, *Inglis v. Gt. North. Rail. Co.*, 1852, 1 Macq. 112 (H. L.), in which it was held, that, where a meeting of a Scotch railway company's finance committee was adjourned, it was sufficient that the minutes of the *adjourned* meeting were signed; though § 101, of 8 & 9

V. c. 17, requires that “*every entry shall be signed by the chairman of such meeting.*”

² 36 & 37 V. c. 33, § 3; now repealed by 45 & 46 V. c. 50 (“The Municipal Corporations Act, 1882”).

³ 45 & 46 V. c. 50, § 22 (5).

⁴ *Id.* s. 22 (6).

⁵ 38 & 39 V. c. 55, Sched. 1, r. 1, sub-r. 10, and r. 2, sub-r. 8. As to the minutes of meetings of creditors in bankruptcy, see ante, § 1552.

reference has been made to a considerable number of documents which are rendered by statute admissible evidence of the particular facts certified therein.¹ To these no further allusion is necessary; but with respect to certificates generally,² it may be observed, that, at common law, a certificate of a mere matter of fact, not coupled with any matter of law, cannot be received as evidence, even though given by a person in an official situation.³ If the person was bound to record the fact, then the proper evidence is a copy of the record duly authenticated. But as to matters which he was not bound to record, his certificate, being extra-judicial, is merely the unsworn statement of a private person, and will therefore be rejected.⁴ So, where an officer's certificate is made evidence by statute of certain facts, he cannot extend its effect to other facts, by stating those also in the certificate; but such parts of the certificate will be suppressed.⁵ Even the certificate of the Sovereign, under the sign-manual, cannot be received.⁶

§ 1784A. However, the judge of the Probate Division has, on two occasions apparently held, that the certificate of the ambassador in England of a foreign country, bearing the seal of the legation, was admissible to prove *the law* of that country.⁷ But the point was not argued in either of these cases, and, moreover, the mere question was, whether or not letters of administration to a foreigner, limited to the property of the deceased in England, should be granted.

§ 1785.⁸ *Books and chronicles of public history* may be here mentioned, as partaking in some degree of the nature of public

¹ Ante, § 1611, n.

² Gr. Ev. § 498, in part.

³ *Omichund v. Barker*, 1774, Willes. 550.

⁴ *Sewell v. Corp.*, 1824, 1 C. & P. 392; *Drake v. Marryat*, 1823, 1 B. & C. 478; *Roberts v. Eddington*, 1801, 4 Esp. 88; *Waldron v. Coombe*, 1810, 3 Taunt. 162; *R. v. Sewell*, 1845, 15 L. J. Q. B. 49; *Oakes v. Hill*, 1833, 14 Pick. 442 (Am.); *Wolfe v. Waahburn*, 1826, 6 Cowen, 261 (Am.); *Jackson v. Miller*, 1827, 6 Cowen, 751 (Am.); *U. S. v. Buford*, 1850, 3 Pet 12, 29 (Am.).

⁵ *Johnson v. Hocker*, 1789, 1 Dall

406; *Governor v. Bell*, 1819, 3 Murph. 331 (Am.); *Governor v. Jeffreys*, 1820, 1 Hawks, 207 (Am.); *Stewart v. Alison*, 1821, 6 Serg. & R. 324 (Am.).

⁶ *Omichund v. Barker*, 1774, Willes. 550. See further, § 1381.

⁷ In the goods of Prince Peter Oldenburg, 1884, 9 P. D. 234; In the goods of Klingeman, 1862, 32 L. J. P. M. & A. 16, these cases appear to be of doubtful authority. For the rules governing the proof of foreign law, see ante, §§ 1423-5.

⁸ Gr. Ev. § 497, in part.

§ 1785. documents, and as being entitled, on the same principle, to a certain degree of credit. Any approved public and general history, therefore, is admissible to prove ancient fact of a public nature, and the general usages and customs of this or of any foreign country.¹ But in regard to matters not of a public and general nature, such as the custom of a particular town, a descent, the nature of a particular abbey, the boundaries of a county, and the like, they are not admissible.² A fortiori, peerages, navy lists,³ clergy lists, court guides, directories, university calendars, and other non-official publications of a similar nature, cannot be received in evidence, however useful they may be to the genealogist, in aiding his researches, and directing him to the sources from which the information contained in them was derived.⁴

¹ See *Read v. Bishop of Lincoln*, [1892] A. C. 644 (P. C.), and cases there collected and discussed; *B. N. P.* 248, 249; case of *Warren Hastings* referred to by *Ld. Ellenborough*, in *Picton's case*, 1804, 30 *How. St. Tr.* 492; *Ld. Bridgewater's case*, undated, cited *Skin.* 15; *Morris v. Harmer*, 1833, 7 *Pet.* 554 (Am.); *Ld. Brounker v. Atkyns*, 1682, *Skin.* 14; *St. Catherine's Hospital case*, 1672, 1 *Vent.* 151; *Neale v. Fry*, 1684, cited 1 *Salk.* 281; *S. C. nom.* *Neal v. Jay*, cited 12 *Mod.* 86; *S. C. nom.* *Lady Ivy and Neal's case*, cited *Skin.* 623. In all the three reports, generally recognised as being reports of the last-named case, it is distinctly stated that certain *Chronicles* were admitted in that case to prove on behalf of the plaintiff that King Philip did not assume the style of King of Spain before a certain time; but, on turning to the report of a case reported under the name of *Mossom v. Ivy*, 1684, 10 *How. St. Tr.* 555, which seems to be the same case as that just referred

to, under another name, no *Chronicles* appear to have been offered in evidence for such a purpose. A history, indeed, was tendered by the defendant to prove when Charles the Fifth resigned, but this was rejected by *Jeffreys, C.J.*, who, after styling the book in his characteristic manner, "a little lousy history," asked with evident irritability, "Is a printed history, *written by I know not who*, an evidence in a court of law?" *P.* 625. It is impossible to reconcile these conflicting reports. See *Pea. Ev.* 82, 83.

² *Steyner v. Droitwich*, 1696, *Skin.* 623; *Piercy's case*, 1682, *T. Jones.* 164; *Lee Peer.*, undated, *Min. Ev.* 155; *Evans v. Getting*, 1834, 6 *C. & P.* 586; 2 *Ph. Ev.* 123, 124; *Hubb. Ev. of Suc.* 699—701.

³ Army lists are admissible, see ante, § 1638A.

⁴ *Marchmont Peer.*, 1838-43, *Min. Ev.* 62, 77; *Hubb. Ev. of Suc.* 700—703. As to "Medical Registers," see ante, § 1638; and as to "Law Lists," see ante, § 1639.

CHAPTER V.

PRIVATE WRITINGS.

§ 1786.¹ The only class of *written Evidence* which remains to be considered, is that of PRIVATE WRITINGS. In discussing this subject, separate mention will not be made of each description of document² comprised in this class; but the principles which govern the *inspection, production, proof, admissibility, and effect* of them all will be stated. And, first, as to the means of obtaining *before or at the hearing* an INSPECTION or copy of such documents as are referred to either in the *pleadings* or in the *affidavits* of the adverse party. By the Rr. S. C.³ “wherever the contents of any document are material, it shall be sufficient in any pleading to state the *effect* thereof as *briefly* as possible, without setting out the whole or any part thereof, unless the precise words of the document or any part thereof are material.” Now, while this rule is highly valuable as affording a check to needless prolixity in pleadings, it is obviously, when standing alone, open to the objection that it affords facilities for shrouding intentions, and taking opponents by surprise; and a subtle draughtsman might under it adopt as his cardinal maxim the bugbear of the Roman bard, “*brevis esse laboro, obscurus fio*,” and treat pleading, like diplomatic speech, as the means of concealing thoughts and purposes.

§§ 1786,
1787.

§ 1787. To render this evil impossible it is further provided,⁴ that each party shall before trial, on giving notice to his opponent in a form provided for the purpose, be entitled to inspect any document referred to in the latter's pleadings or affidavits,⁵ and

¹ Gr. Ev. § 557, in part as to first six lines.

² But see *West of Eng. Bk. v. Canton Ins. Co.*, 1877, 2 Ex. D. 472; and *China St. Ship. Co. v. Comm. Ass. Co.*, 1881, 8 Q. B. D. 142, as to

the discovery of documents relating to marine insurance.

³ Ord. XIX., r. 21.

⁴ Ord. XXXI., rr. 15 and 17.

⁵ Documents referred to in answers to interrogatories are within this

§§ 1787—1791.—that on failure to comply with such notice the party to whom it is given shall not be entitled to put any such document in evidence on his behalf in such cause or matter, unless he shall satisfy the court or a judge that such document relates only to his own title, he being a defendant to the cause or matter, or that he had some other cause or excuse, which the court or judge shall deem sufficient, for not complying with such notice; in which case the court or judge may allow the same to be put in evidence, on such terms as to costs, and otherwise, as the court or judge shall think fit. The rules further provide¹ that if the party to whom the notice is given fails or objects to give the prescribed facilities for inspection the court or judge may order such inspection to be given, but provide that the order shall not be made when and so far as the court or judge shall be of opinion that it is not necessary either for disposing of the cause or matter or for saving costs.

§§ 1788—90. The consideration of the machinery for obtaining inspection, and of the practice under the rules on the subject of inspection, more properly belongs to a book of Practice than to one on the subject of evidence, as do the provisions as to costs by which such rules are guarded.

§ 1791. Besides documents referred to in the pleadings and affidavits of his opponent a party to a suit is entitled to production and inspection of other documents in the possession and power of his adversary. The question as to when other documents relating to any cause or matter are or are not liable to production and inspection is one of substantive Law and not of mere Practice, and as such may properly be considered in this work. The right to inspection and discovery of documents, other than those referred to in pleadings or affidavits, is conferred by an Order,² which provides, that “it shall be lawful for the court or a judge, *at any time during the pendency* of any cause or matter, to order the *production* by any party thereto, *upon oath*, of such of the documents in his possession or power, relating to any matter in question in such cause or matter as the court or judge shall think right; and the court may deal with such documents,

latter term. See *Moore v. Peachey*, 18.
1891, 2 Q. B. 707.

¹ R. S. C. Ord. XXXI., rr. 16, 17, r. 14.

² Viz., R. S. C. Ord. XXXI.

when produced, in such manner as shall appear just." Identical provisions were formerly contained in an enactment,¹ of which the above Rule is substantially a re-enactment, and the judicial interpretation placed upon the enactment must be regarded in construing such Rule.²

§§ 1791—
1793.

§ 1792. Moreover, the present Rule—in common with all the other Rules relating to discovery and inspection to be found in Ord. XXXI.—does not apply to criminal proceedings, or to proceedings on the Crown side, or the Revenue side, of the King's Bench Division, or to proceedings for divorce or other matrimonial causes.³ Under it, too, there formerly existed *no discretion* enabling the refusal of inspection, unless the documents fell within some known rule of protection or privilege acted upon by the old Court of Chancery,⁴ now however by an addition to the rules regulating the production and inspection of documents it is provided⁵ that the court or judge shall not make an order for discovery or inspection of documents when and so far as the court or judge shall be of opinion that it is not necessary either for disposing fairly of the cause or matter or for saving costs.

§ 1793. Although this discretion now exists it is usually exercised in conformity with the principles formerly acted upon by the old Court of Chancery; for this reason it is necessary to consider under what circumstances that court usually enforced the production of papers. In considering this question, the court recognised no distinction between public and private documents, or between deeds and other less formal writings.⁶ Moreover, it would seldom, if ever,—unless specially empowered by the Legislature so to do,⁷—enforce discovery where such discovery would, as stated by the defendant on oath,⁸ subject him to any

¹ The Rule is substantially a re-enactment. § 18 of "The Chancery Procedure Act, 1852" (15 & 16 V. c. 86), repealed by 44 & 45 V. c. 59.

² As pointed out in *Bustros v. White*, 1876, 1 Q. B. D. 423 (Jessel, M.R.).

³ See Ord. LXVIII. As to what are to be considered as "criminal proceedings" for this purpose, see *Derby Corporation v. Derbyshire County Council*, 1897, A. C. 550.

⁴ *Bustros v. White*, 1876 (C. A.),

best reported 45 L. J. Q. B. 642, virtually overruling *Lane v. Gray*, 1873, L. R. 16 Eq. 552.

⁵ R. S. C. Ord. XXXI., rr. 12, 18.

⁶ Wigr. Disc. § 400.

⁷ See ante, § 1456.

⁸ *Webb v. East*, 1879: "In every such case the objection must be taken by the party himself, and be supported by his oath" (Kelly, C.B.). See also S. C. on app., 1880. The objection, therefore, that the discovery of documents may tend to

§ 1793. criminal proceeding, penalty, or forfeiture,¹ or would violate the rules which relate to professional privilege.² Subject to these exceptions,³ any party to an action, whether he were plaintiff or defendant,⁴ was in the old Court of Chancery—and consequently now is in the High Court—entitled to exact from his opponent a discovery of the evidences, and to inspect and take copies⁵ of the writings relating either to his case alone,⁶ or to his case *in common* with that of his opponent;⁷ also to a discovery of everything enabling him to defeat the case or title that he expects his opponent to set up;⁸ and he has a right to know what that case or title will be.⁹ But a party to an action in the old Court of Chancery had—and consequently a party to an action in the High Court now has—no right whatever to a discovery of the evidence,¹⁰ or to an inspection of the writings, either relating exclusively to his adversary's case,¹¹ or not material to the issues to be tried.¹² The present Rules provide for the ordering, in the discretion of the court or judge, of verified copies of extracts of business books instead of inspection of the original books,¹³ and for the inspection

criminate can only be taken to the *production* of the documents alleged to have that effect, and not to the order for discovery: *Spokes v. Grosvenor Hotel Co.*, [1897] 2 Q. B. 124.

¹ Ante, §§ 1453—1458, 1464; *Wigr. Disc.* §§ 127—147, 442. See *Hill v. Campbell*, 1875, L. R. 10 C. P. 222; *Atherley v. Harvey*, 1877, 2 Q. B. D. 524.

² Ante, §§ 911 et seq.; *Wigr. Disc.* §§ 136—138, 442; *May. of Bristol v. Cox*, 1884, 26 Ch. D. 678.

³ In the case of the *Don Francisco*, 1862, 31 L. J. Adm. 205, a further exception was sought to be introduced by a party who objected to produce letters, on the ground that their production would divulge the *secrets of his trade*. This objection, however, was overruled.

⁴ *Wigr. Disc.* § 87.

⁵ *Pratt v. Pratt*, 1882, 51 L. J. Ch. 838.

⁶ *Wigr. Disc.* §§ 23, 26, 284.

⁷ *Smith v. D. of Beaufort*, 1842, 13 L. J. Ch. 33; *Burrell v. Nicholson*, 1833, 1 M. & Rob. 306; *Earp v. Lloyd*, 1857, 3 Kay & J. 549;

Jenkins v. Bushby, 1866, L. R. 2 Eq. 547; *Bolton v. Corp. of Liverpool*, 1833, 1 Myl. & K. 88; *Att.-Gen. v. Lambe*, 1838, 8 L. J. Ex. 323; *Wigr. Disc.* §§ 325, 367; *Combe v. Corp. of London*, 1842, 2 Y. & C.C.C. 631; *Att.-Gen. v. Emerson*, 1882, 10 Q. B. D. 191 (C. A.); *Att.-Gen. v. Thompson*, 1849, 8 Hare. 106; *Stainton v. Chadwick*, 1851, 13 Beav. 320. See *Gomm v. Parrott*, 1857, 26 L. J. C. P. 279.

⁸ *Att.-Gen. v. Corp. of London*, 1850, 19 L. J. Ch. 314; *Stainton v. Chadwick*, 1851, 13 Beav. 320.

⁹ *Id.*

¹⁰ *Comm. of Sew. of Lond. v. Glasse*, 1873, 42 L. J. Ch. 345.

¹¹ *Bolton v. Corp. of Liverpool*, 1833, 1 Myl. & K. 88; *Smith v. D. of Beaufort*, 1842, 13 L. J. Ch. 33; *Glover v. Hall*, 1848, 2 Phillips. 484; *Ingilby v. Shafto*, 1863, 32 L. J. Ch. 807; *Owen v. Wynn*, 1878, 9 Ch. D. 29 (C. A.); *May. of Bristol v. Cox*, 1884, 26 Ch. D. 678.

¹² *Wigr. Disc.* §§ 224—237; *Heugh v. Garrett*, 1875, 44 L. J. Ch. 305.

¹³ R. S. C. Ord. XXXI., r. 19A, §§ (1).

by the court or judge of any document for which privilege is claimed for the purpose of deciding the validity of the claim of privilege.¹ Discovery and inspection can only be had against an opposite party;² and for this purpose a party on the other side of the record is an "opposite party if he is a necessary party to the action, although there may be no issue or matter in question between him and the applicant,"³ and a party on the same side of the record may nevertheless be an opposite party if there is some right to be adjusted in the action between him and the applicant.⁴

§§ 1793;
1793a.

§ 1793A. Discovery, we have seen, could not formerly be enforced in the Court of Chancery, and therefore cannot now be enforced in the High Court, where making it would necessitate a breach of professional confidence. In an earlier part of this work⁵ "the rules which relate to professional privilege" have been discussed and illustrated at some length. Both the general rules as to what communications are privileged, and the especial bearing and effect of these rules in connection with discovery, were much considered by the Court of Appeal in a case⁶ which arose in 1881, and has been previously⁷ cited, as containing a valuable statement of the law on the question of what communications are privileged. In the same case the bearing of the rules and principles prevailing on this subject upon the practice of discovery were also stated. The question in that case was whether, in an action for specific performance of an agreement to grant a building lease to the plaintiff, the defendants were bound to produce letters in their custody, which had passed between their solicitors and their surveyors in relation to the property in question before any dispute had arisen between the parties. In giving his judgment in the Court of Appeal, allowing the order

¹ *Id.*, §§ (2). This applies to any objection to inspection, for example irrelevancy, and the Court has jurisdiction to unseal any portions of documents for which privilege is claimed in order to ascertain whether the objection is well founded. *Erhmann v. Erhmann*, [1896] 2 Ch. 826. See also *Williams v. Quebrada Railway Co.*, [1895] 2 Ch. 751.

² *Shaw v. Smith*, 1886, 18 Q. B. D.

193.

³ *Spokes v. Grosvenor Hotel Co.*, [1897] 2 Q. B. 124.

⁴ *Alcoy and Gandia Ry. v. Greenhill*, 1896, 74 L. T. 345; *Shaw v. Smith*, *supra*.

⁵ *Ante*, §§ 911 et seq.

⁶ *Wheeler v. Le Marchant*, 1881, 17 Ch. D. 681.

⁷ *Ante*, Vol. I. § 916, n.

§§ 1793a for production of these letters, the then Master of the Rolls, the
 —1795. late Sir George Jessel, said,¹ "What we are asked to protect here is this. The solicitor, being consulted in a matter as to which no dispute has arisen, thinks he would like to know some further facts before giving his advice, and applies to a surveyor to tell him what the state of a given property is, and it is said that the information given ought to be protected because it is desired or required by the solicitor in order to enable him the better to give legal advice. It appears to me that to give such protection would not only extend the rule beyond what has been previously laid down, but beyond what necessity warrants."

§ 1794. According to the practice of the old Court of Chancery, the fact that a party had a lien² upon the entries in dispute, or that they are so intermingled with other entries in the book, which his opponent is not entitled to see, as to be incapable of being separated or sealed up,³ was no ground of valid objection to an order for the production of memorandum, admitted to relate to the matters in dispute, and to be in the possession of the person from whom discovery is sought.² In one case,⁴ a party was ordered to produce the whole of an agreement, though in his affidavit he had set out only two clauses of it, and had sworn that they alone assisted his opponent's case, or related to the matter in dispute. But where a document,—such, for example, as a pedigree,—consists of separate parts, some of which relate to the question at issue, which others do not, the party producing the document is not bound to show the whole of it, but he will be allowed to close up or conceal such portions as he can undertake to swear are wholly irrelevant.⁵ As we have already seen⁶ in the case of *business books* the court has now power to order verified copies of the material extracts in the place of inspection.

§ 1795. The rules for regulating inspection and discovery at present in force, are, as has been seen, based on the practice

¹ As reported L. R. 17 Ch. D. 682.

² Lockett v. Cary, 1864, 3 New R. 405; Pratt v. Pratt, 1882, 51 L. J. Ch. 838.

³ Carew v. White, 1842, 5 Beav. 172.

⁴ Luscombe v. Steer, 1867, 37 L. J. Ch. 119.

⁵ Kettlewell v. Barstow, 1872, L. R. 7 Ch. 686; Hunt v. Hewitt, 1852, 21 L. J. Ex. 210; Forshaw v. Lewis, 1855, 10 Ex. 716.

⁶ Ante, § 1593.

which prevailed in the old Court of Chancery prior to the passing of the Judicature Acts. In any case, however, in which discovery and inspection would have been granted according to the old practice in the Common Law Courts, it will, in general, be granted under the present practice. It may, therefore, be pointed out that under the old common law system it was never deemed necessary that the inspection should be demanded exclusively with the view of establishing the original case of the applicant; but the court would always entertain the motion, if the object were to obtain material evidence to answer the opponent's case.¹ Accordingly, where to an action of detinue for a deed the defendant pleaded a general lien for work done by him as solicitor for plaintiff, plaintiff, on an affidavit stating that he had never retained the defendant, and that the bill of costs was due not from himself, but from a third party whom he named, was permitted to inspect such entries in the solicitor's books as related to the costs in question;² where the defence to an action brought by a Gas Light Company for the price of gas supplied under contract, was that the gas was deficient in quantity and defective in quality, inspection by plaintiffs of certain papers in the possession of the defendants, which contained the results of experiments made by the defendants with the view of testing the illuminating power of the gas was granted;³ where, in an action by an architect to recover his commission for superintending the erection of certain buildings for defendant, the defendant's affidavit, in support of an application to inspect plaintiff's day-book or journal, alleged that the work was never done, and that, if it was, the charge was excessive, the defendant was held entitled to an inspection to see if there were any entries relating to the work, and what price was therein charged.⁴ The general rule on this subject would appear to be that documents prepared in the ordinary course of a man's duty or business are not privileged. Thus, in an action by a consignee

¹ Goodman v. Harvey, 1864, 3 New B. 512.

² Scott v. Walker, 1853, 22 L. J. Q. B. 404. See also, Rayner v. Allhusen, 1851; 21 L. J. Q. B. 68; and Galsworthy v. Norman, 1851,

21 L. J. Q. B. 70.

³ London Gas Light Co. v. Chelsea Vestry, 1859, 28 L. J. C. P. 275.

⁴ Hunt v. Hewitt, 1852, 21 L. J. Ex. 210. See Riccard v. Inclosure Commiss., 1854, 24 L. J. Q. B. 49.

§ 1795.

of goods against a shipowner for damage caused by the ship's unseaworthiness, and in which no question arose respecting the solicitor's privilege, inspection by the plaintiff with liberty to take copies was ordered of certain surveys made on the ship in a foreign port, a general average statement, the shipwright's bill for repairs done to the ship, the captain's protest, and the log-book; for all these documents,—if not strictly evidence in themselves,—had an immediate tendency to advance the plaintiff's case, and were proximately connected with the issue to be tried.¹ On the other hand, it equally appears to be a general rule that *documents created in the course of, or with a view to, litigation, are privileged and protected from production.* Thus, in an action against a railway company for injuries sustained on their railway, plaintiff may inspect reports, descriptive of the accident, *made in the ordinary discharge of duty by different servants of the company to their general manager,*² though he will not be allowed to inspect reports made to the defendants by scientific persons, whom they had consulted in confidence *in view of litigation, and for the purpose of ascertaining how the accident had occurred.* Similarly, in two other cases, where railway companies were sued for injuries caused to passengers by an accident, reports by medical men, who had examined the complainants at the instance of the companies' solicitors, and *for the purpose of advising them confidentially on the nature and extent of the injuries,* were protected from inspection as privileged communications.³ It has, indeed, been laid down broadly, that documents which have been prepared by the agent of a party for the *purpose of being submitted to his solicitor* for advice in reference to an intended

¹ *Daniel v. Bond*, 1861, 9 C. B. N. S. 716. See *Baker v. Lond. & S. W. Rail. Co.*, 1867, L. R. 3 Q. B. 91; *Fraser v. Burrows*, 1877, 2 Q. B. D. 624.

² *Woolley v. N. Lond. Rail. Co.*, 1869, L. R. 4 C. P. 602; *Cossey v. Lond. Bright., &c., Rail. Co.*, 1870, L. R. 5 C. P. 146. See also, on this subject, the varying decisions in *Mahony v. Widows' Life Ass. Fund*, 1871, L. R. 6 C. P. 562; *Richards v. Gellatly*, 1872, L. R. 7 C. P. 127;

Fenner v. Lond. & S. East. Rail. Co., 1872, L. R. 7 Q. B. 767; *Malden v. Gt. North. Rail. Co.*, 1874, L. R. 9 Ex. 300; *Skinner v. Gt. North. Rail. Co.*, 1874, L. R. 9 Ex. 298; and *McCorquodale v. Bell*, 1876, 1 C. P. D. 471.

³ *Friend v. Lond. Chat. & Dov. Rail. Co.*, 1877, L. R. 2 Ex. 437, C. A.; *Pacey v. Lond. Tramways Co.*, 1877, 46 L. J. Ex. 698 (C. A.). See 31 & 32 V. c. 119, § 126.

action, are privileged from inspection; and this, too, though they have not, at the time when the inspection is sought, been actually submitted to the solicitor; and, moreover, though they have been drawn up, not at the solicitor's instance, but simply at the spontaneous suggestion of the client himself.¹ Shorthand notes of the evidence taken in a former trial against third persons, in which the questions to be tried were substantially identical with those in dispute in the action in which the application was made, which were in the possession of plaintiff's solicitor, have also been protected from inspection.²

§§ 1795—
1797.

§ 1795A. As we have seen,³ a party to a cause is not compelled to produce title deeds which exclusively relate to his own title, and in no way support that of the plaintiff.⁴

§ 1796. There is a right to inspect books kept in obedience to the requirements of an Act of Parliament, e. g., the books kept in asylums pursuant to the Lunacy Act—and also letters passing before litigation between a person and a statutory authority whose duty it is to look after that party's interest.⁵

§ 1797. The right to inspection is not limited to documents which may be *made evidence* in the action, but it extends to all which may throw light on the case. Accordingly, where the plaintiff had shipped on board the defendant's vessel some goods which were afterwards damaged by a collision between that ship and another, and cross suits, brought by the owners of the two vessels in respect of the collision, had ended in a deed of compromise, which plaintiff sought to inspect, the court, in the absence of objection by the owner of the other ship, granted an application to inspect this deed made by the plaintiff (suing as owner of the goods), holding that it clearly related to the *matter in question*, and that it *might* contain an admission of the

¹ The Southwark Water Co. v. Quick, 1878, 3 B. Q. D. 315 (C. A.), affirming Q. B. See, also, The Theodor Korner, 1878, 3 P. D. 162.

² Nordon v. Defries, 1882, 8 Q. B. D. 508. See, also, The Palermo, 1883, 9 P. D. 6.

³ Supra, § 458.

⁴ Where, however, a party by his pleading sets up a transaction under

which he claims title, although the documents may be privileged from production and inspection, he may nevertheless be ordered to give particulars such as dates, consideration, &c.: Milbank v. Milbank, [1900] 1 Ch. 376.

⁵ Hill v. Philp, 1852, 21 L. J. Ex. 82.

**§§ 1797
—1808.**

defendant's liability;¹ and where defendant had resold to the plaintiff some timber bought by him abroad, and the plaintiff, having complained on its delivery that it was not according to contract, the defendant wrote to his original sellers, and a long correspondence thereupon ensued, which resulted in a great abatement of price on the part of the original vendors, the plaintiff was held entitled to an inspection of the correspondence just mentioned.²

§ 1798. It would be altogether foreign to a book on the principles of the law of evidence to discuss, in any detail, at what stage of an action discovery can be obtained either as to documents or as to interrogatories, both of which subjects will be found adequately dealt with in the ordinary works as to Practice.³ An order for the production of documents may still be made⁴ by the judge who has directed the reference, after a cause or matter has been referred to an official special *referee* or officer of the court under section 14 of the Arbitration Act, 1889.⁵ Subject to any such order, the referee himself may exercise a similar authority.⁶ When, however, an action has by consent been referred, *with all matters in difference*, the judge has no longer any power to order the inspection of documents, because the suit, in such case, is no longer pending before the court;⁷ and any application for discovery must thereafter be made to the arbitrator.⁸

§§ 1799—1808. It would, again, not be relevant to this work to say more as to the machinery which the present practice provides for obtaining discovery of documents, than that there are two stages in obtaining such discovery. The first stage is to obtain from the opponent an affidavit stating on oath what documents are or have been in his possession. A party is, in the

¹ *Hutchinson v. Glover*, 1875, 1 Q. B. D. 138; *Bustros v. White*, 1876, 1 Q. B. D. 423 (Jessel, M.R.).

² *English v. Tottie*, 1875, 1 Q. B. D. 141.

³ See, e. g. the Annual Practice for 1905, p. 383.

⁴ Under R. S. C. Ord. XXXI. r. 14.

⁵ 52 & 53 V. c. 49. But although the court or a judge has concurrent

authority with the referee, the application should ordinarily be made to the referee: *MacAlpine v. Calder*, [1893] 1 Q. B. 545.

⁶ Under R. S. C. Ord. XXXVI. r. 50.

⁷ *Penrice v. Williams*, 1883, 23 Ch. D. 353.

⁸ See, R. S. C. Ord. XXXVI. rr. 50, 55c.

High Court, enabled¹ to accomplish this first stage on paying into court a sum of at least five pounds,² as a Rule of the Supreme Court provides that "any party may, without filing any affidavit, apply to a court or a judge for an order directing any other party to any cause or matter to make discovery on oath of the documents which are or have been in his possession or power relating to any matter in question therein. On the hearing of such application the court or judge may either refuse or adjourn the same if satisfied that such discovery is not necessary, or make such order either generally or limited to certain classes of documents as may in their or his discretion be thought fit," and in the affidavit in answer, the person who is directed to make discovery must "specify which, if any, of the documents therein mentioned, he objects to produce." A claim of privilege from production thus made is in general treated as conclusive, and no order will be made to produce the documents unless the Court is reasonably satisfied or reasonably certain from particular sources,³ that the nature of the documents has been erroneously represented or misconceived, or that the documents are of such a character that the party cannot properly make such an assertion.⁴ The second stage in obtaining discovery of documents is to obtain the actual inspection of the documents disclosed, and as to this, it is provided,⁵ that "if the party from whom discovery of any kind or inspection is sought objects to the same, or any part thereof, the court or judge *may*,—if satisfied that the right to the discovery or inspection sought depends on the determination of any issue or question in dispute in the cause or matter,⁶ or that for any other reason it is desirable that any issue or question in dispute in the cause or matter should be determined before deciding upon the right to the discovery or inspection,—order that such issue or question be

§ 1799—
1808.

¹ By Ord. XXXI. r. 12.

² R. S. C. Ord. XXXI. rr. 25, 26.

³ See these discussed Annual Practice for 1905, pp. 235-6, 400-1.

⁴ Att.-Gen. v. Emerson, 1882, 10 Q. B. D. 191; *Frankenstein v. Gavin Cycle Co.*, [1897] 2 Q. B. 62.

⁵ By Ord. XXXI. r. 20.

⁶ See *Whyte v. Ahrens*, 1884, 26 Ch. D. 717, where the Court of Appeal

was divided, as to whether merchants, —who had charged their agents with fraud in general terms, and been met by a defence denying the charges, and pleading a settled account,—were or were not bound to give particulars of fraud under Ord. XIX. r. 6, before obtaining an order for discovery of documents.

§§ 1808—determined first, and reserve the question as to the discovery or
1810a. inspection.”¹

§ 1809. Where documents are ordered to be produced for purposes of inspection, the order is generally confined to the applicant himself or his legal adviser. Still the law does not require such limitation to be strictly enforced in all cases; and the court will occasionally authorise an inspection by other fitting and necessary persons. Thus, for instance, inspection may in a fit case be ordered to be had by the plaintiff's land agent, even though he be himself a witness in the suit; ² if letters be written in a foreign language the aid of an interpreter may be called in; if the papers to be produced be engineering plans, a surveyor or other expert will be allowed to attend the inspection,³ and where documents are suspected to be forged, the court will sometimes, on an affidavit impeaching their genuineness,⁴ order them to be submitted to experts, and such order may be made either before or after decree.⁵

§ 1810. The rules in force in the High Court as to discovery apply to the Probate and Admiralty Divisions⁶ equally with the other Divisions of the High Court. The Probate Court, however, possesses in addition important powers of enforcing the *production of testamentary instruments*. The powers are contained alike in the English Act⁷ and in the Irish Act.⁸ Details as to the procedure and practice under the above enactments will be properly ascertained from one of the works which treat exclusively of the Practice in Probate.

§ 1810a. Under Rule 72 of the Bankruptcy Rules, 1886—90, any party to any proceeding in any Bankruptcy Court “may, with the leave of the court, administer interrogatories to, or

¹ See *Wood v. The Anglo-Italian Bk.*, 1876, 34 L. T. 255; *Parker v. Wells*, 1881, 18 Ch. D. 477 (C. A.); *In re Leigh's Estate*, *Rowcliffe v. Leigh*, 1877, 6 Ch. D. 256 (C. A.)

² *Att.-Gen. v. Whitwood Local Board*, 1870, 40 L. J. Ch. 592.

³ *Swansea Vale Rail. Co. v. Budd*, 1866, L. R. 2 Eq. 274.

⁴ *Boyd v. Petrie*, 1868, 19 W. R. 221.

⁵ *Id.*

⁶ For the former law as to the Court of Probate, see 20 & 21 V. c. 77 (“The Court of Probate Act,

1857”), § 36; *Id.* c. 79, § 42, *Ir.*; *Hunt v. Anderson*, 1868, L. R. 1 P. & D. 476; and as to the Admiralty Court, see 24 & 25 V. c. 10, § 17, now repealed by 44 & 45 V. c. 59; *The Mary or Alexandra*, 1868, L. R. 2 A. & E. 319; *The Don Francisco*, 1862, 31 L. J. Adm. 205; *The Macgregor Laird*, 1867, L. R. 1 A. & E. 307. See, also, a similar clause in “The Court of Admiralty (Ireland) Act, 1867” (30 & 31 V. c. 114), § 41, *Ir.*

⁷ 20 & 21 V. c. 77, § 26.

⁸ *Id.* c. 79, § 31, *Ir.*

obtain discovery of documents from, any other party to such proceeding. Proceedings under this rule shall be regulated as nearly as may be by the Rules of the Supreme Court for the time being in force in relation to discovery and inspection. An application for leave under this rule may be made *ex parte*." §§ 1810a—1816.

§§ 1811—13. The Judicature Act, 1873,¹ makes the Rules of Equity as to discovery, which have already been referred to,² also applicable in the County Court. And the rules now in force in the County Courts as to discovery are substantially the same as those of the High Court.³

§§ 1814—15. It may be useful to add, while briefly pointing out the powers of enforcing discovery now possessed by various courts, that under the Friendly Societies Act, 1896, powers are conferred on the County Courts, and courts of summary jurisdiction, and also on the chief registrar and assistant registrars of Friendly Societies, to determine certain disputes, and all these functionaries have vested in them the authority of granting to either party such discovery as to documents, and otherwise, or such inspection of documents, as might be granted by any court of law or equity.⁴

§ 1816. With respect to the *production* of documents at the trial little need be said here; for since parol evidence of the contents of writings cannot be given as primary proof, the party who relies upon a document must either produce it, or give such satisfactory reason for its non-production as will justify him in having recourse to secondary evidence.⁵ If, therefore, he will require to give evidence of the contents of a paper which has been either lost or destroyed, or the production of which will be physically impossible or highly inconvenient, the particular fact relied on must be proved;⁶ if it be in the custody of a stranger, he must be served with a writ of subpoena duces tecum;⁷ and if it be in the hands or power of the adverse party, the practice in general is to give him or his solicitor a regular notice to produce

¹ 36 & 37 V. c. 66, § 89.

² *Supra*, § 1793.

³ See, generally, C. C. R. of 1903, Ord. XVI.

⁴ 59 & 60 V. c. 25, § 68, subs. (7).

⁵ *Ante*, § 428. As to the effect of

producing a document to a witness under cross-examination, see *ante*, §§ 1413, 1446, 1452.

⁶ *Ante*, §§ 428, 429, 438.

⁷ *Ante*, § 457.

§§ 1816— it at the trial.¹ The adversary is of course, not obliged by such
 1818. notice to furnish evidence against himself; but the notice is given,—as has been before explained,²—to lay a foundation for the introduction of secondary evidence of the contents of the document, by showing that the party has done all in his power to insure its production.

§ 1817.³ Where notice has been given to the opponent to produce papers in his possession or power, the *regular time for calling for their production* is not until his case has been entered upon by the party who requires them; till which time the other party may, in strictness, refuse to produce them, and no cross-examination as to their contents is then allowable.⁴ Still, it is considered rigorous to insist upon this rule, and as a close adherence to it would be productive of inconvenience, the judges are very unwilling to enforce it.⁵ In practice a party who has given to his opponent notice to produce certain documents is allowed to call for them at any stage of the hearing. The production of papers upon notice does not make them evidence in the cause unless the party calling for them inspects them, so as to become acquainted with their contents; in which case he is obliged to use them as his evidence,⁶ at least if they be in any way material to the issue.⁷ The reason for this rule is, that it would give an unconscionable advantage to a party, to enable him to pry into the affairs of his adversary, without at the same time subjecting him to the risk of making whatever he inspects evidence for both parties.

§ 1818. If a party, after notice, declines to produce a document. when formally called upon to do so, he will not afterwards be allowed to change his mind; and therefore, if he once refuses, he cannot, when his opponent has proved a copy, and is about to have it read, produce the original, and object to its admissibility without the evidence of an attesting witness.⁸ Neither, after

¹ Ante, § 440 et seq.

² Ante, § 440.

³ Gr. Ev. § 563, in part.

⁴ *Graham v. Dyster*, 1816, 2 Stark. R. 23.

⁵ *Sideways v. Dyston*, 1817, 2 Stark. R. 49; *Calvert v. Flower*, 1836, 7 C. & P. 386.

⁶ *Calvert v. Flower*, 1836, 7 C. & P. 386; *Wharam v. Routledge*, 1805, 5 Esp. 235.

⁷ *Wilson v. Bowie*, 1823, 1 C. & P. 10. See *Sayer v. Kitchen*, 1795, 1 Esp. 210.

⁸ *Edmonds v. Challis*, 1849, 18 L. J. C. P. 164; *Jackson v. Allen*, 1822, 3 Stark. R. 74.

such refusal, will he be permitted to put the document into the hands of his opponent's witnesses for the purposes of cross-examination,¹ or to produce and prove it as part of his own case.² The same rule prevails where a party determines upon keeping back a chattel, when called upon under notice to produce it.³

§ 1819.⁴ When the instrument, on its production, appears to have been altered, it is a general rule that *the party offering it in evidence must explain this appearance, if he be called upon to do so by the issue raised*,⁵ and *if the instrument be not admitted by his opponent under notice*;⁶ because, as every alteration on the face of a written instrument renders it suspicious, it is only reasonable that the party claiming under it should remove the suspicion.⁷ If the alteration be noted in the attestation clause as having been made before the execution of the instrument, it is sufficiently accounted for, and the credit of the instrument is restored.⁸ It was formerly a presumption of law, that an interlineation, if nothing appeared to the contrary, had been made contemporaneously with the execution of the instrument;⁹ and this presumption still prevails in the case of a deed, because a deed cannot be altered after its execution without fraud or wrong, and fraud or wrong is never assumed without some proof.¹⁰ Indeed, it may be laid

§§ 1818,
1819.

¹ *Doe v. Cockell*, 1834, 6 C. & P. 527.

² *Doe v. Hodgson*, 1840, 12 A. & E. 135; *Collins v. Gashon*, 1860, 2 F. & F. 47.

³ *Lewis v. Hartley*, 1835, 7 C. & P. 405. There notice was given to produce a dog for the purpose of identification.

⁴ Gr. Ev. § 564, in part.

⁵ *Parry v. Nicholson*, 1845, 14 L. J. Ex. 119.

⁶ *Freeman v. Steggall*, 1849, 19 L. J. Q. B. 18; ante, § 724B.

⁷ *Henman v. Dickinson*, 1828, 5 Bing. 183; *Clifford v. Parker*, 1841, 10 L. J. C. P. 227; *Lond. & Bright. Rail. Co. v. Fairclough*, 1841, 10 L. J. C. P. 133; *Ld. Falmouth v. Roberts*, 1842, 11 L. J. Ex. 180.

⁸ "The Merchant Shipping Act, 1894" (57 & 58 V. c. 60), expressly enacts, in § 122, that "Every erasure, interlineation, or alteration in any agreement with the crew (except additions made for the purpose of

shipping substitutes or persons engaged after the first departure of the ship) shall be wholly inoperative, unless proved to have been made with the consent of all the persons interested in the erasure, interlineation, or alteration, by the written attestation (if in her Majesty's dominions) of some superintendent, justice, officer of customs, or other public functionary, or elsewhere, of a British consular officer, or, where there is no such officer, of two respectable British merchants." This attestation is not required in the case of fishing boats, where all parties consent to the alteration, &c. See *Id.* § 407.

⁹ *Trowell v. Castle*, 1661, 1 Keb. 22. This appears to be still the law in America. See *Franklin v. Baker*, 1891, 29 Am. St. R. 547 (Am.).

¹⁰ *Doe v. Catomore*, 1851, 20 L. J. Q. B. 728; *Simmons v. Rudall*, 1850, 1 Sim. N. S. 115, 136.

§§ 1819,
1820.

down as a general rule, that wherever it is an offence to alter a document after it has been completed, the law presumes, *prima facie*, that any alteration apparent on it was made at such a time and under such circumstances as not to constitute an offence.¹ Alterations apparent on the face of a will, however, are presumed to have been made after the will was executed until evidence to the contrary is adduced.² With respect to a bill of exchange, or a promissory note, the law presumes nothing,³ but leaves the jury to decide, first, by inspecting the instrument itself, whether any alteration has been made; and then, on considering the extrinsic evidence offered, at what time, and under what circumstances, such alteration, if any, was made.⁴ These last questions cannot be solved by the jury on the mere inspection of the writing, for juries must decide, not on conjecture, but on proof.⁵

§ 1820. The general rule of law is, that any *material alteration* in a written instrument, if made after its execution, and without the privity of the party to be affected by it, is fatal to its validity. Even an alteration made by a stranger will, in some cases render an instrument wholly void as against a person seeking to enforce it,⁶ and indeed there is authority for saying that any material alteration made by a stranger under any circumstances, at least whilst the instrument was in the custody of the person subsequently seeking to enforce it, will entirely vitiate the instrument.⁷ The rule was originally propounded with respect to deeds,⁸ probably because, in former days, most written engagements were drawn in that form.⁹ It has since been extended to negotiable

¹ *R. v. Gordon*, 1855, 25 L. J. M. C. 19. There an affidavit was produced with an interlineation on it.

² *Doe v. Palmer*, 1851, 16 Q. B. 747; *Christmas v. Whinyates*, 1863, 3 Sw. & T. 81, and see ante, § 164.

³ *Johnson v. D. of Marlborough*, 1818, 2 Stark. R. 312.

⁴ *Bishop v. Chambre*, 1827, M. & M. 116; *Taylor v. Moseley*, 1833, 6 C. & P. 273; *Cariss v. Tattersall*, 1841, 2 M. & Gr. 890. All these questions are, of course, determined in the first instance by the court, when they are raised upon a preliminary objection to the admissibility of the instrument; but they are again open to the jury: *Ross v.*

Gould, 1828, 3 Greenl. 204 (Am.).

⁵ *Knight v. Clements*, 1838, 5 A. & E. 215; *Clifford v. Parker*, 1841, 10 L. J. C. P. 227; *Byrom v. Thompson*, 1839, 3 P. & D. 71.

⁶ *Suffell v. Bank of England*, 1852, 9 Q. B. D. 555.

⁷ *Davidson v. Cooper*, 1844, 13 M. & W. 343; *Pigot's case*, 1614, 11 R. 26; *Suffell v. Bank of England*, supra (*Jessel, M.R.*) at p. 559-60. See this point further discussed, post, §§ 1827-9.

⁸ *Pigot's case*, 1614, 11 Co. Rep. 27.

⁹ *Master v. Miller*, 1791, 4 T. R. 329.

securities,¹ bought and sold notes,² guarantees,³ and policies of assurance;⁴ and may now be said to apply equally to all written instruments, which constitute the evidence of contracts.⁵

§ 1821.⁶ Its grounds are twofold. First, public policy dictates that no man should be permitted to take the chance of committing a fraud, without running any risk of losing by the event in case of detection;⁷ secondly, the rule ensures the identity of the instrument, and prevents the substitution of another, without the privity of the party concerned.⁸ These grounds are common to all altered written instruments. And, as regards bills of exchange and promissory notes, a third reason for the rule is the necessity of protecting the revenue arising from the stamp laws,⁹ with respect to which it is immaterial whether the alteration were made with or without the consent of the parties to the instrument.¹⁰

§ 1822. A short reference to some leading cases will explain what constitutes materiality. Thus, any alteration in negotiable securities, as to the date,¹¹ amount, or time of payment;¹² the addition of a claim for a specific rate of interest;¹³ the insertion of words to limit or vary the consideration as originally expressed;¹⁴ the introduction of a place for payment, though the acceptance still remains a general acceptance;¹⁵ the substitution of one place

¹ *Master v. Miller*, 1791, 4 T. R. 329; S.C. 1793, 2 H. Bl. 141, in error.

² *Powell v. Divett*, 1812, 15 East, 29; *Mollett v. Wackerbarth*, 1847, 17 L. J. C. P. 47.

³ *Davidson v. Cooper*, 1843, 12 L. J. Ex. 467; 13 L. J. Ex. 276.

⁴ *Forshaw v. Chabert*, 1821, 3 B. & B. 158; *Fairlie v. Christie*, 1817, 7 Taunt. 416; *Campbell v. Christie*, 1817, 2 Stark. R. 64.

⁵ *Davidson v. Cooper*, 1843, 12 L. J. Ex. 467; 13 L. J. Ex. 276.

⁶ Gr. Ev. § 565, as to first six lines.

⁷ *Master v. Miller*, 1791, 4 T. R. 329.

⁸ *Sanderson v. Symonds*, 1819, 1 B. & B. 430.

⁹ *Mason v. Bradley*, 1843, 12 L. J. Ex. 425 (Parke, B.); *Davidson v. Cooper*, 1843, 12 L. J. Ex. 467; 13 L. J. Ex. 276.

¹⁰ *Bowman v. Nichol*, 1794, 5 T. R.

537. As to alterations in bills and notes, see the provisions of the Bills of Exchange Act, 1882, set out post, § 1832.

¹¹ *Outhwaite v. Luntley*, 1815, 4 Camp. 179; *Walton v. Hastings*, 1815, 4 Camp. 223; *Cardwell v. Martin*, 1808, 9 East, 180; *Master v. Miller*, 1791, 4 T. R. 330; *Vance v. Lowther*, 1876, 1 Ex. D. 176.

¹² *Bowman v. Nichol*, 1794, 5 T. R. 537; *Alderson v. Langdale*, 1832, 3 B. & Ad. 660.

¹³ *Warrington v. Early*, 1853, 23 L. J. Ex. 47.

¹⁴ *Knill v. Williams*, 1809, 10 East, 431.

¹⁵ *Macintosh v. Haydon*, 1826, Ry. & M. 362; *Burchfield v. Moore*, 1854, 22 L. J. Q. B. 261; *Desbrowe v. Wetherby*, 1834, 1 M. & Rob. 438; *Taylor v. Moseley*, 1833, 6 C. & P. 273 (Ld. Lyndhurst, C.B.); *Crotty v. Hodges*, 1842, 4 M. & Gr. 561; *Cowie*

§§ 1822,
1823.

for another:¹ the converting a joint, into a joint and several, responsibility;² the affixing an additional maker's name to a joint and several note after it has issued;³ or, it seems, the cutting off the signature of one of several co-promisers in a joint and several note;⁴—will, at common law, as against any party *not consenting* thereto, invalidate the instrument, even in the hands of an innocent holder; and will in many cases prove equally fatal, by virtue of the stamp laws, though made by consent of all parties.⁵ So, the alteration of a Bank of England note, by merely erasing the number upon it and substituting another, will avoid the instrument, and preclude even a subsequent bona fide holder for value from maintaining an action upon it.⁶ Alteration by inserting in a sold note an additional term of contract without the knowledge of the purchaser,⁷ or by converting an agreement into what is apparently a deed, by affixing seals to the signatures of the parties,⁸ vitiates the instrument. In short, any alteration which causes an agreement or other writing to speak a language different, in legal effect, from what it originally spoke, is material.

§ 1823. On the other hand, the insertion of such words as the law would supply, or such as are altogether inoperative, or such as are necessary to correct an obvious error,⁹ will not constitute a material alteration, even though made without consent. Thus, where, subsequently to the execution of a policy, the insured

v. Halsall, 1821, 3 Stark. R. 36. See 45 & 46 V. c. 61 ("The Bills of Exchange Act, 1882"), § 19.

¹ *Tidmarsh v. Grover*, 1813, 1 M. & Selw. 735; *R. v. Treble*, 1810, 2 Taunt. 329.

² *Perring v. Hone*, 1826, 4 Bing. 28.

³ *Gardner v. Walsh*, 1855, 24 L. J. Q. B. 285; overruling *Catton v. Simpson*, 1838 8 A. & E. 136. See *Gould v. Coombs*, 1845, 14 L. J. C. P. 175; *Ex parte Yates*, *In re Smith*, 1858, 27 L. J. Bk. 9.

⁴ *Mason v. Bradley*, 1843, 12 L. J. Ex. 425. See *Nicholson v. Revill*, 1836, 4 A. & E. 675. The removing, however, of the seal of one of several obligors, does not, in the case of a *several* bond, render it void as to the

others. *Collins v. Prosser*, 1823, 1 B. & C. 682. See, also, *Caldwell v. Parker*, 1869, Ir. R. 3 Eq. 519; though this case has been much doubted, if not overruled, by *Suffell v. Bk. of Eng.*, 1882, 9 Q. B. D. 555 (C. A.).

⁵ *Chit. on Bills*, 181—185; 1 Sm. L. C., 11th ed. 803.

⁶ *Suffell v. Bk. of Eng.*, 1882, 9 Q. B. D. 555 (C. A.). See *Leeds and County Bk. v. Walker*, 1883, 11 Q. B. D. 84.

⁷ *Powell v. Divett*, 1812, 15 East. 29; *Mollett v. Wackerbarth*, 1847, 17 L. J. C. P. 47.

⁸ *Davidson v. Cooper*, 1844, 12 L. J. Ex. 467; 13 L. J. Ex. 276.

⁹ See *Bluck v. Gompertz*, 1832, 21 L. J. Ex. 25.

inserted some words which gave him no power to do any one thing which he could not have done under the policy as it originally stood, the instrument was not vacated;¹ and where the words "on demand" are added to a promissory note, which originally expressed no time for payment, this alteration, as it does not change the legal effect of the instrument, does not vitiate it, though the words were added by the payee without the assent of the maker;² so too, where the name of a party to a conveyance was erroneously stated to be "William G." and subsequently altered to "Edward Thomas G." this was held to be an immaterial alteration, "William G." in the conveyance in fact being only an erroneous description of the real party whose name was subsequently inserted.³ An alteration made in an instrument by the consent, in order to carry out the original intention, of the parties, will not make it bad, or be any infringement of the stamp laws. Thus, the insertion of a place for payment in a bill of exchange will not vitiate it, at least, as against the acceptor, although the addition is made after acceptance if the words be added or altered by the acceptor, or with his consent;⁴ filling in the date of a warrant of attorney after execution will not avoid the instrument, since the parties must clearly have intended that the date should be inserted;⁵ where, in a bond conditioned for the payment of 100*l.*, the word "hundred" had been accidentally omitted in the second place in which the sum was mentioned, its insertion by a stranger was held to be immaterial;⁶ and similarly where, in a note intended to be negotiable, the words "or order" had been left out by mistake, their insertion by the holder, with the consent of the maker, was held neither to vitiate the instrument nor to render a new stamp necessary.⁷

§ 1823.

¹ *Sanderson v. Symonds*, 1819, 1 B. & B. 430; *Clapham v. Cologan*, 1813, 3 Camp. 382.

² *Aldous v. Cornwell*, 1868, L. R. 3 Q. B. 573.

³ *Howgate and Osborn's Contract*, [1902] 1 Ch. 451.

⁴ *Walter v. Cubley*, 1833, 2 C. & M. 151; *Stevens v. Lloyd*, 1829, 1 M. & M. 292; *Jacob v. Hart*, 1817, 6 M. & Selw. 142.

⁵ *Keane v. Smallbone*, 1855, 25 L. J. C. P. 72.

⁶ *Waugh v. Bussell*, 1814, 5 Taunt. 707.

⁷ *Byrom v. Thompson*, 1839, 11 A. & E. 31; *Kershaw v. Cox*, 1800, 3 Esp. 246; *Hamelin v. Bruck*, 1847 15 L. J. Q. B. 343; *Jacob v. Hart*, 1817, 6 M. & Selw. 142; *Brutt v. Picard*, 1824, Ry. & M. 37; *Robinson v. Touray*, 1813, 1 M. & Selw. 217;

§ 1824. § 1824. It is not, however, on every occasion of a party tendering an instrument in evidence, that he is bound to explain any material alteration that appears upon its face; but only on those occasions, when he is *seeking to enforce it, or claiming an interest under such instrument*.¹ Accordingly, where an action for not cultivating the farm according to agreement was brought against one who had become tenant of such farm from year to year, and subsequently signed an agreement respecting the mode of tillage, and the instrument, when produced by the landlord, contained an erasure in the habendum, by which the term of years was altered from seven to fourteen, it was held that the landlord was not bound to explain this alteration, because the tenant held the farm under a parol agreement, which incorporated only so much of the written instrument as was applicable to a yearly holding, and it consequently was quite immaterial whether seven or fourteen years were mentioned in that instrument. The simple contract which the parties had entered into was, that the tenant should farm the land according to certain written stipulations. Said Parke, B., "The rule of law applies where the obligation is by reason of the instrument; here the obligation is by reason of the parol contract of the parties quite independent of the subscription of that paper, and arising from the occupation of the land upon all the terms of that instrument which are applicable to a tenancy from year to year, as to which an alteration in the term of years is wholly immaterial."²

Farquhar v. Southey, 1826, M. & M. 14; Eagleton v. Gutteridge, 1843, 12 L. J. Ex. 359. For American cases connected with this subject, see Hunt v. Adams, 1810, 6 Mass. 519; Smith v. Crooker, 1809, 5 Mass. 538; Hale v. Russ, 1821, 1 Greenl. 335; Knapp v. Maltby, 1835, 13 Wend. 587; Brown v. Pinkham, 1836, 18 Pick. 172.

¹ Harris v. Tenpany, 1883, 1 C. & E. 65, as reported, seems to be an utter misapprehension of the law. That was an interpleader, in which the plaintiff claimed certain furniture which had been seized by an execution creditor. He relied on an agreement of hiring by which he had let

to the execution debtor "several articles mentioned in the schedule hereto." At the time of executing this contract, no schedule was attached to it, but one was afterwards added by the plaintiff. On these facts, Lopes, J., is actually reported to have held, that the agreement was not vitiated by the alteration, but that the goods seized might be identified with those named in the schedule. Sed qu., and compare post, § 1836, and cases there cited.

² *Ld. Falmouth v. Roberts*, 1842, 11 L. J. Ex. 180. See, also, *Pattinson v. Luckley*, 1875, L. R. 10 Ex. 330.

§ 1825. On the same principle again, where in another case,¹ in an action for an excessive distress, the plaintiff, in order to prove the amount of rent really due, put in an agreement purporting to be one for the lease of a house, No. 35, which was in fact the house occupied by him, but it appeared that the number of the house as originally inserted in the instrument was 38, but the jury found that this had been altered to 35 after the execution of the agreement, and without the defendant's knowledge, it was held that, as the demise was admitted on the record, the altered agreement might be given in evidence to show the terms of the holding. Said Lord Abinger, "I do not think, when the case is rightly understood, that the question arises, whether an alteration even by the plaintiff ought to avoid the agreement. If it does, the only consequence would be, that it would be impossible for him to maintain an action upon it as on a demise; but it is quite a different question, whether it can be given in evidence. *It may be void for the purpose of taking an interest under it, but nevertheless admissible to prove a collateral fact.*" * * * No case has gone the length of saying that, when a deed is altered, and thereby vitiated, it ceases to be evidence: it may be so with reference to the stamp laws. * * * Here, however, it is sufficient to decide, that this agreement was evidence to prove the terms of the holding; and there was no evidence of any other holding than that of the house No. 35."²

§§ 1825,
1826.

§ 1826. It follows, from the principle exemplified by the cases just cited, that a deed is not rendered inadmissible by alteration, if it be produced "merely as proof of some right or title created by, or resulting from, its *having been executed*."³ In other words after the deed *has done its work* it may be produced to show the state of things which has been thereby called into existence, and this even though it has been subsequently altered. Thus in the case of an ejectment to recover lands which have been conveyed by lease and release, what the plaintiff seeks to enforce is not, in

¹ *Hutchins v. Scott*, 1837, 6 L. J. Ex. 186.

² See, also, *Agricult. Cattle Ins. Co. v. Fitzgerald*, 1851, 20 L. J. Q. B. 244.

³ In *Hutchins v. Scott*, 1837, as

reported 2 M. & W. 815—817.

⁴ See *Agricult. Cattle Ins. Co. v. Fitzgerald*, 1851, 20 L. J. Q. B. 244; *Ld. Ward v. Lumley*, 1860, 29 L. J. Ex. 322.

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1828-9.

strictness, a right under the lease and release, but a right to the possession of the land, *resulting from the fact of the lease and release having been executed*. The moment after their execution the deeds in one sense become valueless, since the estate has already passed. Their only subsequent use is not to pass any estate but only to afford evidence of the fact. Plainly, if the effect of the execution of such deeds was to create a title to the land in question, that title cannot be affected by the subsequent alteration of the deeds. But if the party is not proceeding by ejectment to recover the land conveyed, but is suing the grantor under his covenants for title, or other covenants contained in the release, then the alteration of the deed in any material point after its execution, whether made by the party or by a stranger, would certainly defeat the right of the party suing to recover.”¹ If, however, the estate lies *in grant*, as a watercourse, and cannot exist without deed, it is said that any alteration by the party claiming the estate will avoid the deed as to him, and that therefore the estate itself, as well as all remedy upon the deed, will be utterly gone.²

§ 1827. In one of the cases³ which has been cited as an authority for the proposition that an alteration in an instrument under which a right is claimed makes such instrument void, the doctrine, that every material alteration of an instrument, *even by a stranger*, and *without the privity of either party*, avoids that instrument, was recognised and adopted, and held to apply in all cases, *where the altered instrument is relied on as the foundation of a right sought to be enforced*.⁴

§§ 1828—9. That a material alteration in some classes of instruments such for instance as Bank of England notes, will render them wholly void, although the alteration is made by a stranger and before the instrument came into the custody of the person subsequently seeking to enforce it, and without his privity,

¹ Davidson v. Cooper, 1843, 12 L. J. Ex. 467 (Ld. Abinger). See, also, Dr. Leyfield's case, 1610, 10 Co. Rep. 88; Bolton v. Bp. of Carlisle, 1793, 2 H. Bl. 259; Doe v. Hirst, 1821, 2 Stark. R. 60.

² More v. Salter, 1615, 3 Bulst. 79 (Coke, C.J.); Lewis v. Payn, 1827,

8 Cowen, 71.

³ Viz., Davidson v. Cooper, 1843, 12 L. J. Ex. 467, cited ante, § 1820.

⁴ Davidson v. Cooper, 1843, 13 L. J. Ex. 276; Crookewit v. Fletcher, 1857, 26 L. J. Ex. 153; Bk. of Hindos., China, and Japan v. Smith, 1867, 36 L. J. C. P. 241.

seems to admit of no doubt,¹ but whether it would now be held, §§ 1828-9. at any rate in a Court of Appeal, that any material alteration made by a stranger in any instrument and without the privity of the person subsequently seeking to enforce it, even whilst the instrument is in that person's custody, will render it wholly void, seems to admit of very considerable doubt. It is true that in the case referred to in the last paragraph,² it was directly decided that such was the law, and that such a decision appears to come strictly within the wording of the second resolution of the judges in the leading case on the subject of alterations in written instruments,³ which resolution was expressly stated to be undoubted law by Sir George Jessel, M.R., as recently as 1882.⁴ That a mere act of spoliation by a stranger would not avoid a written instrument was, however, clearly the view of Lord Ellenborough, C.J.;⁵ and the doctrine has been expressly rejected in America⁶ by the New York Civil Code, after having been previously rejected in various American cases.⁷ In one of these, Story, J., strongly condemned it as repugnant to common sense and justice,—as inflicting on an innocent party all the losses occasioned by mistake, by accident, by the wrongful act of third persons, or by the providence of Heaven—and as a rule which ought to have the support of unbroken authority, before a court of law should feel bound to surrender its judgment to what deserves no better name than a technical quibble. In these observations the American judge, moreover, was subsequently supported by Alderson, B., who remarked,⁸ “It is difficult to understand why an alteration by a stranger should in

¹ *Suffell v. Bank of England*, 1882, 9 Q. B. D. 555; *Leeds Bank v. Walker*, 1883, 11 Q. B. D. 84.

² *Davidson v. Cooper*, 1843, 13 M. & W. 343.

³ *Pigot's case*, 1614, 11 R. 26.

⁴ *Suffell v. Bank of England*, *supra*.

⁵ *Henfree v. Bromley*, 1805, 6 East, 309.

⁶ In New York, the law is as follows:—“The party producing a writing as genuine which has been altered, or appears to have been altered, after its execution, in a part material to the question in dispute, must account for the appearance or alteration.

He may show that the alteration was made by another without his concurrence, or was made with the consent of the parties affected by it, or otherwise properly or innocently made, or that the alteration did not change the meaning or language of the instrument. If he do that, he may give the writing in evidence, but not otherwise”: Code Civ. § 1794.

⁷ *United States v. Spalding*, 1822, 2 Mason, 478 (Am.). And see, further, cases cited *infra*, in next note but one.

⁸ In *Hutchins v. Scott*, 1837, 6 L. J. Ex. 186.

§§ 1828-9. any case avoid the deed—why the tortious act of a third person should affect the rights of the two parties to it, unless the alteration goes the length of making it doubtful what the deed originally was, or what the parties meant.” In another and more recent case,¹ Lord Herschell expressed his doubt whether in every case an alteration which would invalidate a document when made with the privity and knowledge of the person having the custody of it and relying upon it would invalidate it if made in fraud of him and against his will. Even in places in America where the New York Code does not prevail, the doctrine is not recognised to the extent now established in England; but, unless some fraudulent intent be brought home to the party claiming under the instrument, the unwarranted alteration of a writing by a stranger is treated as a merely accidental spoliation, which in that country does not vitiate the instrument.² In Ireland, again, it is held that an instrument is not rendered void by any alteration in it, which an unauthorised stranger may make.³ The doctrine is, moreover, also inconsistent with several old English cases, decided in conformity with the custom of merchants, in which it was held, that the cancellation by mistake of a cheque or bill does not invalidate the instrument;⁴ and also with the express provisions now contained in the Bills of Exchange Act, 1882.⁵ It is likewise inconsistent with a case⁶ where a deed to lead the uses of a recovery was held good, though the seals

¹ *Lowe v. Fox*, 1887, 12 A. C. 206.

² *Cutts v. U. S.*, 1812, 1 Gall. 69 (Am.); *U. S. v. Spalding*, 1822, 2 Mason, 478 (Am.); *Rees v. Overbaugh*, 1827, 6 Cowen, 746 (Am.); *Lewis v. Payn*, 1827, 8 Cowen, 71 (Am.); *Jackson v. Malin*, 1818, 15 Johns. 297 (Am.); *Nichols v. Johnson*, 1834, 10 Conn. 192 (Am.); *Marshall v. Gougler*, 1823, 10 Serg. & R. 164 (Am.).

³ *Swiney v. Barry*, 1835, Jones, 109 (Ir. Ex. Ch.).

⁴ *Raper v. Birkbeck*, 1812, 15 East, 17; *Fernandey v. Glynn*, 1807, 1 Camp. 426; *Wilkinson v. Johnson*, 1824, 3 B. & C. 428; *Novelli v. Rossi*, 1831, 2 B. & Ad. 757; *Warwick v. Rogers*, 1843, 12 L. J. C. P. 113.

⁵ 45 & 46 V. c. 61, § 63, sub-sect. 3.

⁶ *Lady Argoll v. Cheney*, 1624, Palmer, 402. But in a comparatively modern case (*Master v. Miller*, 1791), Buller, J. (as reported 4 T. R. 339), remarked, “In any case where the seal is torn off by accident after plea pleaded (see 1 Roll. B. 40, also cited in *Pigot's case*, 1614, 11 Co. Rep. 27, and *Michael v. Scockwith*, 1587, Cro. Eliz. 120, in both which cases the court on this ground held that the mutilated instrument was the deed of the party on non est factum; and in these days, I think, even if the seal were torn off before the action brought, there would be no difficulty in framing a declaration, which would obviate every doubt on that point by stating the truth of the case.”

had been torn off by a little boy ; and with another case,¹ where an award was sustained, though the umpire, after it had been made, altered the amount, leaving the original sum awarded still legible. It must, however, be conceded, that these last two decisions are of less authority on this particular point, as they possibly turned on the distinction between an instrument constituting the foundation of a right, and that which simply furnishes evidence of some right resulting from its execution.² The argument in support of the doctrine is that it creates no real hardship, since the party whose right of action is defeated by the alteration has his remedy by an action against the spoliator;³ but this argument is entitled to little weight, since the spoliator may either be a child or other irresponsible agent, or be utterly incompetent to pay any damages. If it be further urged, as was done by the judges of the Exchequer Chamber in the case which was decided in 1843,⁴ that the party who has the instrument in his possession is bound to take proper care of it, this at least assumes that the alteration is made while the instrument is in his custody, and consequently cannot support the broad proposition stated above. On the whole it at any rate may be gravely questioned, whether the sound rule of law can now be carried further than this, that any party, seeking to enforce a right under a written instrument, is so far responsible for any material alteration apparent on its face, as to be bound to show that it was made, either before its execution, or at a time when the instrument was not in his possession, or not under his control, or perhaps that it was a mere accidental spoliation or made by a stranger in fraud of himself; and that, unless he can establish one or other of these facts, the instrument will be

§§ 1828-9.

¹ *Henfrey v. Bromley*, 1808, 6 East, 309.

² See ante, § 1826.

³ *Markham v. Gonaston*, 1698, Cro. Eliz. 626.

⁴ *Viz., Davidson v. Cooper*. "After much doubt, we think the judgment (of the Ct. of Ex.) right. The strictness of the rule on this subject, as laid down in *Pigot's Case*, can only be explained on the principle, that a party, who has the custody of an instrument made for his benefit, is

bound to preserve it in its original state. It is highly important, for preserving the purity of legal instruments, that this principle should be borne in mind, and the rule adhered to. The party who may suffer has no right to complain, since there cannot be any alteration except through fraud or laches on his part": *Ld. Denman*, in pronouncing judgment of Ex. Ch., as reported 13 M. & W. 352.

§§ 1829—
1831. vitiated. The case¹ decided in 1843, which has been referred to above clearly goes beyond this and, although for the reasons above given it appears doubtful whether it would now be supported in its entirety, has never been expressly overruled.

§ 1890. While the English law is that every *material* alteration in an instrument after it has been executed, by whoever it is made, will in general render such instrument invalid, modern cases have now established that² a mere *immaterial* alteration, though made by the *obligee himself*, will not avoid an instrument, provided it be done innocently, and to no injurious purpose.³ But if the alteration be *fraudulently made* by the party claiming under the instrument, it does not seem important, whether it be in a material or an immaterial part. In either case, he has brought himself under the operation of the rule established for the prevention of mal-practices; and having fraudulently destroyed the identity of the instrument, he must incur the peril of all the consequences.⁴

§ 1831. It has been said that, in order to render an alteration fatal, it must have been made *after the execution or other completion of the instrument*. These words are, in general, sufficiently explicit; but as to two classes of cases, viz., (1) policies of insurance, composition deeds, and settlements, and (2) negotiable instruments, embarrassing questions respecting their interpretation have arisen. With regard also to the second of these classes, considerable modifications of the common law rules regarding alterations in documents have been effected by the Bills of Exchange Act, 1882.⁵

¹ Viz., *Davidson v. Cooper*, 1843, 12 L. J. Ex. 467; 13 L. J. Ex. 276, cited *supra*, § 1827.

² Gr. Ev. § 568, in part.

³ *Aldous v. Cornwell*, 1868, L. R. 3 Q. B. 573; *Sanderson v. Symonds*, 1819, 1 B. & B. 430; *Hatch v. Hatch*, 1812, 9 Mass. 311; *Smith v. Dunham*, 1829, 8 Pick. 246. In *Farquhar v. Southey*, 1826, M. & M. 14, the acceptance of a bill was signed "Southey & Crowder"; the bill was originally addressed to "Messrs. Southey, Crowder & Co."; but the address was altered to correspond with the acceptance. Held, that this was an immaterial alteration, and

that the acceptors were not discharged (*Littledale, J.*).

⁴ *Pigot's case*, 1614, 11 Co. Rep. 27; cited *arguendo* in *Master v. Miller*, 1791, as reported 4 T. R. 322; and *Davidson v. Cooper*, 1843, as reported 11 M. & W. 789; *Shep. Touch.* 68; *Sanderson v. Symonds*, 1819, 1 B. & B. 430. If an obligee procure a person who was not present at the execution of the bond to sign his name as an attesting witness, this is *prima facie* evidence of fraud, and avoids the bond: *Adams v. Frye*, 1841, 3 Metc. 103.

⁵ 45 & 46 V. c. 61

§ 1831A. The first class of these instruments comprehends *policies of assurance, composition deeds, and other settlement deeds*, in which several parties with independent interests, joining to effect some general purpose, execute one common deed at different times. By considering such deeds as instruments of a peculiar nature, embracing separate contracts with different individuals, the strict rule of law has been, to a certain degree, eluded;¹ and it has been held that any alterations made during the progress of such transactions still leave the deeds valid as to the parties previously executing them, provided such alterations have not affected the situation in which these parties stood.²

§§ 1831a,
1832.

§ 1832. With regard to negotiable securities the Bills of Exchange Act, 1882, the provisions of which, so far as they are material to this purpose, are applicable to bills of exchange, promissory notes and bankers' cheques, contains express provisions as to the effect of alterations in such instruments. By section 63, where a bill is intentionally cancelled by the holder or his agent, and the cancellation is apparent thereon, the bill is discharged. In like manner any party liable on a bill may be discharged by the intentional cancellation of his signature by the holder or his agent. In such case any indorser who would have had a right of recourse against the party whose signature is cancelled, is also discharged. A cancellation made unintentionally, or under a mistake, or without the authority of the holder, is inoperative; but where a bill or any signature thereon appears to have been cancelled, the burden of proof lies on the party who alleges that the cancellation was made unintentionally, or under a mistake, or without authority. By section 64, where a bill or acceptance is materially altered without the assent of all parties liable on the bill, the bill is avoided except as against a party who has himself made, authorised or assented to the alteration, and subsequent indorsers. Provided that where a bill has been materially altered, but the alteration is not apparent and the bill is in the hands of a holder in due course, such holder may avail himself of the bill as if it had not been altered, and may enforce

¹ Davidson v. Cooper, 1843, 12 L. J. Ex. 467 (Ld. Abinger). See West v. Steward, 1845, 14 M. & W. 47, cited post, § 1835.

² Doe v. Bingham, 1821, 4 B. & Ald. 672, recognised in Hibblewhite v. M'Morine, 1840, 9 L. J. Ex. 217.

§§ 1832,
1833.

payment of it according to its original tenour. By section 97 sub-s. 3 the effect of the stamp laws, however, is expressly preserved, the effect of which is to considerably cut down the effect of this proviso. In the case of negotiable securities a difficulty arises in applying the general rule, that a material alteration made, without the consent of all parties, in an instrument after its execution renders such instrument void. In this case, the time of the "execution" of an instrument is, apart from the stamp laws, considered to be the date of its making, accepting, drawing, or indorsing by the party against whom it is produced. The question often arises, however, as to the precise period at which a bill or note will be considered complete, for the purposes of the stamp laws, so that any subsequent alteration, whether made with or without consent of the parties, will invalidate the instrument by reason of such *stamp laws*! In answer to this question, it may be broadly stated, that a negotiable security is complete, as soon as, but not until, it becomes an *available* instrument, or, in other words, when it is in the hands of a party who can make a valid claim upon it. Thus, on the one hand, an accommodation bill may be altered after it has been drawn, accepted, and indorsed, provided it has not been passed to a bona fide holder for value;¹ a bill for value, if unindorsed, is not deemed complete till its acceptance;² and not even then, unless it be absolutely returned to the payee.³ On the other hand, every material alteration, whether made before or after acceptance, or with or without consent, will, subject to the statutory provisions above referred to, invalidate a bill, whether it be drawn for accommodation or for value, if it be once issued to a person who, as holder for valuable consideration, is entitled to sue any prior party thereon.⁴

§ 1833. The principles of the stamp laws with respect to negotiable securities, are equally applicable to other instruments. Consequently, no new stamp was necessary, where a bond, after

¹ Downes v. Richardson, 1822, 5 B. & Ald. 674; Tarleton v. Shingler, 1849, 7 C. B. 812. See Cardwell v. Martin, 1808, 9 East, 190.

² Kennerly v. Nash, 1816, 1 Stark. R. 452.

³ Sherrington v. Jermyn, 1828, 3 C. & P. 374.

⁴ Outhwaite v. Luntley, 1815, 4 Camp. 179; Walton v. Hastings, 1815, 4 Camp. 223. See, further, Chit. Bills, 186—189.

execution, but before it had passed to the obligee, was altered, by inserting with the consent of the parties, the name of an additional obligor;¹ or where,² after a marriage settlement had been executed by the conveying party, but, before it was executed by the other parties, or had passed into the hands of the persons who were to take under it, a clause was objected to and struck out, and the deed then re-executed. The question in all such cases as the above is, whether, taking into consideration all the circumstances, the matter was or was not in fieri; and that, to use Mr. Preston's language, "depends on the inquiry, whether the intended grantor has given sanction to the instruments, so as to make it conclusively his deed."³

§§ 1833,
1834.

§ 1834. Both for the purposes of a person's being taken to have given his assent to an alteration in the instrument effecting it, and for the purposes of the stamp laws, it will, generally speaking, be deemed that a transaction is incomplete, and, consequently, that an alteration in the instrument by which it is carried out may be made, so long as such instrument remains in the grantor's possession, or is in the hands of a third party as an agent for him, provided there be nothing to show that the instrument was intended to operate immediately, or that it was accepted as an effectual deed by the party in whose favour it was made.⁴ Thus, if an instrument be delivered as an *escrow*, which is not to take effect as a deed until a certain event has happened, it may be altered with impunity.⁵ On the other hand, if a *grantor has once parted with all control over the instrument*, it can

¹ *Matson v. Booth*, 1816, 5 M. & Selw. 223. See *Zouch v. Clay*, 1671, 1 Ventr. 185.

² *Jones v. Waters*, 1835, 4 L. J. Ex. 109. See, also, *Spicer v. Burgess*, 1834, 1 C. M. & B. 129; *Murray v. Ld. Stair*, 1823, 2 B. & C. 82; *Johnson v. Baker*, 1821, 4 B. & Ald. 440.

³ 3 Prest. on Abstr. 64.

⁴ See cases cited in last note but one.

⁵ *Hudson v. Revett*, 1829, 5 Bing. 269; explained (Alderson, B.) in *West v. Steward*, 1845, 14 M. & W. 47. See also, *Jones v. Walters*, and other cases cited ante, in notes to

§ 1833. Whether a deed was executed as an *escrow*,—unless the point depends on documentary evidence alone,—is for the jury, who should look to all the facts attending the execution, and who are not now bound, as formerly, to find in the negative, if no express words have been used declaratory of such an intention: *Bowker v. Burdekin*, 1843, 12 L. J. Ex. 329; *Furness v. Meek*, 1858, 27 L. J. Ex. 34; *Kidner v. Keith*, 1863, 15 C. B. N. S. 35. See, also, *Gudgen v. Besset*, 1856, 26 L. J. Q. B. 36; *Watkins v. Nash*, 1875, L. R. 20 Eq. 262; and ante, §§ 41, 43, and 1135.

§§ 1834,
1835.

no longer be altered, though it has not been actually delivered to the grantee.¹ Accordingly, where A. executed a deed transferring certain railway shares, with the name B. inserted as that of the purchaser, and, having received the purchase-money from B.'s brokers, delivered to them the instrument, the transaction was held to be perfected at common law, though B. had not executed the deed, and though the Railway Act directed that, on every sale of shares, the deed should be executed by both parties; and therefore, the name of C. being afterwards substituted for B., and the deed re-executed by the seller, the court held that it could not operate as a conveyance to C. whose name had been inserted subsequently as being the purchaser, without having a fresh stamp.²

§ 1835. Often, however, deeds of transfer and other documents are executed in blank. Questions of nicety sometimes arise respecting the validity of instruments which have been thus *executed in blank*, and subsequently filled up. In dealing with such questions, distinctions are recognised, first, between deeds and other instruments; and secondly, as to deeds, between the insertion of matter essential to their operation, and that which is not so essential. Thus, writs and subpoenas may, it seems, be sealed in blank, and then filled up;³ an acceptance, written on a blank piece of stamped paper may be afterwards converted into a bill of exchange, to the extent of such sum as the stamp will cover;⁴ and blanks may be filled up in a deed

¹ Doe v. Knight, 1826, 5 B. & C. 671. See Richards v. Lewis, 1852, 20 L. J. C. P. 177; and Xenos v. Wickham, 1866, L. R. 2 H. L. 296.

² L. B. & S. C. Rail. Co. v. Fairclough, 1841, 10 L. J. C. P. 133. Perhaps, if the railway company, who produced and relied upon the altered deed, had shown that B.'s name had originally been inserted by *mistake*, no new stamp would have been requisite. See ante, § 1823.

³ See Hibblewhite v. M'Morine, 1840, as reported 6 M. & W. 207, *arguendo*.

⁴ 45 & 46 V. c. 61, § 20, sub-s. 1; Garrard v. Lewis, 1882, 10 Q. B. D. 30; Schultz v. Astley, 1836, 2 Bing.

N. C. 544; Collis v. Emett, 1790, 1 H. Bl. 313; Russell v. Langstaffe, 1780, 2 Doug. 514. See Hatch v. Searles, 1854, 2 Sm. & G. 147; Hogarth v. Latham, 1878, 3 Q. B. D. 643 (C. A.); and L. & S. W. Bk. v. Wentworth, 1880, 5 Ex. D. 96. As between the drawer and the acceptor, a blank acceptance must, too, be filled up within a reasonable time (45 & 46 V. c. 61, § 20, sub-s. 2; Temple v. Pullen, 1853, 22 L. J. Ex. 151. See Carter v. White, 1882, 20 Ch. D. 225; Riley v. Gerrish, 1851, 9 Cush. 104 (Am.)). But this doctrine does not apply to a *bonâ fide* indorsee for value without notice. for the law presumes, with reference to him, that the drawer was invested

after its execution, if the omission did not render it a nullity, and the matter inserted carries out the original intention of the grantor, or is introduced with his consent,¹ so that, for instance, a christian name may be filled in,² or a schedule of creditors may be added to a deed which expressly speaks of them as mentioned in "the schedule hereunto annexed."³

§§ 1835,
1836.

§ 1836. If, however, an instrument, at the time of its execution, was, by reason of some material deficiency, incapable of operating as a deed, it cannot afterwards become a deed by being completed and delivered by a stranger, in the absence of the party who executed it, unless such stranger be authorised by instrument under seal; for, if this were permitted, the principle would be violated which requires that an attorney appointed to execute and deliver a deed for another must be so appointed by deed.⁴ Accordingly, where a proprietor of railway shares has executed a conveyance of three shares with the name of the purchaser in blank, nothing having originally passed by this deed, an agent appointed by parol cannot afterwards, in the absence of his principal, introduce the name of a vendee;⁵ and, for the same reason, if a deed contain a covenant to deliver to the covenantee certain articles "as per schedule annexed," and the schedule is not annexed at the time of execution, the subsequent annexation of a schedule, in the absence of one of the parties does not give it operation as part of the deed, and the instrument is insensible and void.⁶

with a general authority from the acceptor to fill up the bill at any time (45 & 46 V. c. 61, § 20, sub-s. 3. *Montague v. Perkins*, 1853, 22 L. J. C. P. 187. See *Hatch v. Searles*, 1854, 2 Sm. & G. 147. An acceptor who has accepted a bill bearing a stamp sufficient to cover an amount larger than that filled in at the time of acceptance and so drawn that a fraudulent alteration of the amount is possible, is not liable to a bona fide holder for value for any amount beyond the actual acceptance although the bill has been subsequently fraudulently altered to a larger amount (*Scholfield v. Londesborough*, [1896] A. C. 514).

¹ *Markham v. Gonaston*, 1599, Cro. El. 626; *Zouch v. Clay*, 1671, 1 Vent. 185.

² *Eagleton v. Gutteridge*, 1843, 12 L. J. Ex. 359.

³ *West v. Steward*, 1845, 14 M. & W. 47. With this case and that cited in the last note, compare *Weeks v. Maillardet*, 1811, 14 East, 568, and the other cases cited *infra*, in note at end of this section.

⁴ *Hibblewhite v. M'Morine*, 1840, 9 L. J. Ex. 217 (Parke, B.). See ante, § 985.

⁵ *Hibblewhite v. M'Morine*, 1840, 9 L. J. Ex. 217, overruling *Texira v. Evans*, undated, cited 1 Anstr. 228. See *Swan v. N. Brit. Austral Co.*, 1863, 32 L. J. Ex. 273; *Taylor v. Gt. Ind. Pen. Rail. Co.*, 1859, 28 L. J. Ch. 709.

⁶ *Weeks v. Maillardet*, 1811, 14 East, 568, noticed (Parke, B.) in 6 M. & W. 215, 1840; and in *West v.*

§§ 1837,
1838.

§ 1837. These cases, in which the deed originally passes no interest, and is wholly inoperative, must be carefully distinguished from those¹ where a blank is filled up in an instrument which was evidently intended to be filled in, and the filling in of which consequently merely carries out the intention and objects of the original instrument.²

§ 1838. The rule of law which requires the party, tendering in evidence an altered instrument, to explain its appearance, does not apply to *letters and ancient documents* coming from the right custody, merely because they are in a mutilated or imperfect state. With regard to such documents, this fact alone is not sufficient to throw upon the party producing them the burthen of proving when, by whom, or for what purpose, they were mutilated; but they will be received, though the mutilation be evidently not accidental, provided that a sufficient portion of the instrument remains to explain its general nature and effect, and it can be shown that it is produced in the same state in which it was actually found. The weight due to such a document may be a just matter of comment, and in many cases a jury would regard it as utterly valueless. Still, no legal objection can be taken to its being presented to their notice, such as it is; and the right enjoyed by the opponent, of insisting that the whole instrument shall be read, is not infringed by its admission, since that rule merely provides that no part of the deed, in the state

Steward, 1845, 14 M. & W. 47. See *Dyer v. Green*, 1847, 10 L. J. Ex. 239; and *Daines v. Heath*, 1847, 16 L. J. C. P. 117. Compare, however, *Harris v. Tenpany*, *supra*, note to § 1824.

¹ Such as those mentioned *supra*, in § 1835; in addition to which, see *Tupper v. Foulkes*, 1861, 30 L. J. C. P. 214.

² In accordance with the principle here suggested, effect was given to clear and unequivocal acts of assent in pais by a feme mortgagor, after the death of her husband, as amounting to a re-delivery of a deed of mortgage, executed by her while a feme covert: *Goodright v. Straphan*, 1774, 1 Cowp. 201; *Shep. Touch.* 58. "The general rule," said Johnson, J., in delivering the judgment of the

court in *Duncan v. Hodges*, 1827, 4 McC. 239 (Am.), "is, that if a blank be signed, sealed, and delivered, and afterwards written, it is no deed: and the obvious reason is, that as there was nothing of substance contained in it, nothing could pass by it. But the rule was never intended to prescribe to the grantor the order of time in which the several parts of a deed should be written. A thing to be granted, a person to whom, and the sealing and delivery, are some of those which are necessary and the whole is consummated by the delivery; and if the grantor should think proper to reverse this order in the manner of execution, but in the end makes it perfect before the delivery, it is a good deed." See ante, § 149.

in which it actually is, shall be withheld from the jury without the consent of the adverse party.¹

§§ 1838,
1839-41.

§§ 1839—41. Formerly, if an instrument, on being produced, appeared to be signed by *subscribing witnesses*, it was required that one of them at least *should be called* to prove its execution.² But the C. L. P. Act of 1854 (now repealed³) first altered this. And by the Law of Evidence and Practice in Criminal Cases Act, 1865⁴ (which extends to “all Courts of Judicature as well criminal as all others, and to all persons having, by law, or by consent of parties, authority to hear, receive and examine evidence, whether in England or Ireland”), it is enacted, that “It shall not be necessary to prove by the attesting witness any instrument, to the validity of which attestation is not requisite; and such instrument may be proved as if there had been no attesting witness thereto.” The first consideration, therefore, when an attested document is tendered in evidence, is whether or not it be of such a nature as to *require attestation*. In a former chapter⁵ many statutes have been referred to, which render attestation necessary, in order to give validity to particular instruments. There are, however, many other documents to the validity of which attestation is necessary.⁶

¹ *Ld. Trimleston v. Kemmis*, 1843, 9 Cl. & Fin. 763; *Evans v. Rees*, 1839, 2 P. & D. 627.

² *Doe v. Durnford*, 1813, 2 M. & Selw. 62; *Higgs v. Dixon*, 1817, 2 Stark. R. 180; *Currie v. Brown*, 1812, 3 Camp. 283.

³ By 55 & 56 V. c. 19 (“Statute Law Revision Act, 1892”).

⁴ 28 & 29 V. c. 18, § 7.

⁵ Part IV., Ch. III.

⁶ Among such documents are the following:—*Assignments of Copy-rights* (ante, § 1110); *Bail Bonds assignments* (ante, § 1110); *Bills of Sale* (id.); *Charity*, conveyances to charitable uses under “The Mortmain Act” (id.); *Cognovits* (ante, § 1111); *Guardians*, deeds of fathers appointing guardians of their children (ante, § 1110); *Leases*, under “The Leasing Powers Act for Religious Worship in Ireland, 1855” (18 & 19 V. c. 39), § 10 (cited ante, § 1110); *Marriage registers* (ante, § 1110); *Middlesex registry*, certificates of searches and

memorials, and some copies of enrolments, granted by the registrar of deeds and wills in Middlesex (ante, § 1652B); *Powers*, all instruments executed under powers, where the persons creating such powers have required the execution to be attested (see 2nd Rep. of Com. Law Commiss. p. 23); *Powers of attorney* to transfer or receive dividends on colonial stock (40 & 41 V. c. 59 (“The Colonial Stock Act, 1877”), § 4, sub-s. 1, and § 6); *Protests* of bills of exchange by persons not notaries (ante, § 1110); *Shipping documents*, including all bills of sale of British ships (ante, § 998A); and agreements, alterations of agreements, releases, and indentures of apprenticeship, executed in conformity with the provisions of “The Merchant Shipping Act, 1894” (57 & 58 V. c. 60) (ante, § 1098); but in the case of shipping documents, the subscribing witnesses need not be called to prove the due execution of the instruments, for the Act provides,

**§§ 1842,
1843.**

§ 1842. Notwithstanding the clear language of the Legislature, cited above,¹ that "it shall *not* be necessary to prove by the attesting witness any instrument," &c., in petitions in lunacy and in Chancery it is still the practice to require proof of documents by the attesting witness, though if he be abroad proof of his handwriting will be enough.²

§ 1843. The general rule requiring the production of an attesting witness, when the validity of an instrument depends upon its formal attestation, is so inexorable, that it applies even to a cancelled³ or a burnt⁴ deed. Moreover, when the deed is one which falls within the provisions above¹ set out the attesting witness to it must be called, even although the deed be one the execution of which is admitted by the party to it:⁵ and that, too, though such admission be deliberately made, either in open court,⁶ or in a subsequent agreement,⁷ or even in a sworn answer to interrogatories delivered to the party in the cause.⁸ Nay, a party in a cause who is called as a witness by his opponent, cannot be required, or even permitted, to prove the execution by himself of any instrument, to the validity of which attestation is requisite so long as the attesting witness is capable of being called.⁹

in § 694, that, "where any document is required by this Act to be executed in the presence of, or to be attested by, any witness or witnesses, that document may be proved by the evidence of any person who is able to bear witness to the requisite facts without calling the attesting witness, or the attesting witnesses, or any of them"; *Stage carriages*, agreements between the owners and drivers of metropolitan stage carriages (ante, § 1099); *Trustees'* appointments where they are trustees of property conveyed to religious or educational purposes (ante, § 1110); *Warrants of attorney* (ante, § 1111); and *Wills* (ante, § 1050).

¹ *Supra*, §§ 1839—41.

² *Re Rice*, 1886, 32 Ch. D. 35 (C. A.); *Re Reay's Estate*, 1855, 1 Jar. N. S. 222; see, also, *Leigh v. Lloyd*, 1865, 34 L. J. Ch. 646; *Re Mair's Estate*, 1873, 42 L. J. Ch. 882.

³ *Breton v. Cope*, 1791, Peake, 31.

⁴ *Gillies v. Smither*, 1819, 2 Stark. R. 528.

⁵ *Abbot v. Plumbe*, 1779, 1 Doug.

216, referred to (*Lawrence, J.*) in 7 T. R. 267 (1797); and again in 2 East, 187 (1802); and confirmed by *Ld. Ellenborough* as an inexorable rule, in *R. v. Harringworth*, 1815, 4 M. & Selw. 353. See, also, *Mounsey v. Burnham*, 1841, 1 Hare, 15. In India § 70 of the Ind. Evid. Act of 1872 enacts that "the admission of a party to an attested document of its execution by himself shall be sufficient proof of its execution as against him, though it be a document required by law to be attested."

⁶ *Johnson v. Mason*, 1794, 1 Esp. 89 (*Ld. Kenyon*, citing *Ld. Mansfield* to same effect).

⁷ *Doe v. Penfold*, 1838, 8 C. & P. 537. But see *Bringloe v. Goodson*, 1839, 5 Bing. N. C. 738; and post, § 1849.

⁸ See *Call v. Dunning*, 1803, 4 East, 53. But see *Bowles v. Langworthy*, 1793, 5 T. R. 366. Also, post, §§ 1847A, 1849.

⁹ *Whyman v. Garth*, 1853, 22 L. J. Ex. 316; a decision which some may think displays a somewhat too

§ 1843A. The attesting witness must, moreover, be called, though, subsequently to the execution of the deed, he has become blind;¹ and the court will not dispense with his presence on account of illness, however severe.² If the indisposition of the witness be of long standing, the party requiring his evidence should have applied for power to examine him before a commissioner or examiner,³ and if he be taken suddenly ill, a motion must be made to postpone the trial.⁴ §§ 1843a — 1845.

§ 1844. The rule that where an attesting witness is necessary to the validity of an instrument, a person who was such witness must be called, applies, whatever be the purpose for which the instrument is produced.⁵ But, though the witness must be called, in the first instance, he is rather the witness of the court than of the party, and great latitude will, therefore, be allowed in the mode of examining him, and, if it be necessary, the judge will even permit questions in the nature of a cross-examination to be put.⁶ Moreover, the party calling him is not precluded from giving further evidence, in case he denies, or does not recollect, having seen the instrument executed.⁷

§ 1845.⁸ Some ten important exceptions have, however, been engrafted upon the general rule, which requires the production of the subscribing witnesses to the instrument of which proof is required. These are as follows: (1) when the instrument to be proved is thirty years old or more; (2) where such instrument is attested merely in pursuance of a rule of court, and the court which has laid down such rule has subsequently acted upon the

stubborn resolution stare super antiquas vias.

¹ *Cronk v. Frith*, 1839, 9 C. & P. 197; *Rees v. Williams*, 1847, 1 De G. & Sm. 31 314. See, contra, *Wood v. Drury*, 1699, 1 Ld. Raym. 734; and *Pedler v. Paige*, 1833, 1 M. & Rob. 258 (Parke, B., reluctantly yielding to the authority of Ld. Holt). See ante, § 477.

² *Harrison v. Blades*, 1813, 3 Camp. 457 (Ld. Ellenborough); see, contra, *Jones v. Brewer*, 1811, 4 Taunt. 46 (where Sir J. Mansfield observes that "perhaps in some cases of sickness," the handwriting of the attesting witnesses may be proved). See ante, § 477.

³ R. S. C. 1883, Ord. XXXVII. rr. 1, 5.

⁴ *Harrison v. Blades*, 1813, 3 Camp.

457.

⁵ *Manners v. Postan*, 1803, 4 Esp. 239 (where the deed was used in evidence collaterally); *R. v. Jones*, 1777, 1 Lea. 174 (where the indictment was put in upon an indictment against an apprentice for a fraudulent enlistment).

⁶ *Bowman v. Bowman*, 1843, 2 M. & Rob. 501 (Cresswell, J.); ante, § 1404, ad fin.

⁷ *Ley v. Ballard*, 1790, 3 Esp. 173 n.; *Fitzgerald v. Elsee*, 1811, 2 Camp. 635; *Lemon v. Dean*, 1810, 2 Camp. 636, n.; *Talbot v. Hodson*, 1816, 7 Taunt. 251; overruling *Phipps v. Parker*, 1808, 1 Camp. 412. See also ante § 1056 as to the proof of attestation of wills.

⁸ Gr. Ev. § 570, in part.

§§ 1845— instrument ; (3) when such instrument is in the possession of the
 1847. adverse party who, after a notice to do so, refuses to produce it ;
 (4) when all the parties to such instrument are represented before
 the court, and the instrument is not one which, by the statute
 already cited,¹ requires attestation for its validity ; (5) where the
 party producing such instrument, pursuant to notice so to do,
 claims a subsisting interest under it in the cause ; (6) where the
 very object of the deed is to create a formal and solemn admission
 of that which is the foundation of the cause ; (7) where the party
 producing the instrument is a public officer, whose duty it was to
 procure its execution ; (8) where the production of an attesting
 witness is legally or physically impossible ; (9) where such
 instrument is one under the seal of a corporation ; and (10) where
 the instrument is a deed rendered valid by its having been enrolled.
 Such being the various exceptions, each of such exceptions will in
 turn be now considered.

§ 1845A. The first of these exceptions is that when an *instrument*,
 proof of which is required, is *thirty years old* or more, the sub-
 scribing witnesses need not be called, as they are presumed to be
 dead.² This doctrine applies to a memorial of a deed.³

§ 1846. The *second exception* to the general rule is, when the
 attesting witness has attested such *instrument merely in pursuance*
of a Rule of some court, and such court has subsequently recognised
 the validity of the instrument by *acting upon it*, as, e.g., the Court
 of Bankruptcy.⁴ But where no proof is given that the court
 requiring the attestation has ever *acted* upon the instrument,
 unless the attesting witness is called, it will not be received.⁵

§ 1847. A *third exception* to such general rule is when the instru-
 ment is proved to be in *possession of the adverse party, who, after*
proper notice so to do, refuses to produce it. In this case, the
 party who is driven to give secondary evidence of its contents
 need not call an attesting witness, though the plea be *non est*
factum, and though the name of the witness were mentioned in
 the notice, and he be actually in court.⁶

¹ Supra, § 1839—41.

² Ante, § 87.

³ *Miller v. Wheatley*, 1890, 28
 L. R. Ir. 144.

⁴ *Bailey v. Bidwell*, 1844, 13 L. J.
 Ex. 264.

⁵ *Streeter v. Bartlett*, 1848, 17
 L. J. C. P. 140.

⁶ *Cooke v. Tanswell*, 1818, 8 Taunt.
 450 ; *Poole v. Warren*, 1838, 8 A. &
 E. 588. Ante, § 1818.

§ 1847A. A *fourth exception* is said to exist where all the parties to a deed are represented before the court, and the deed itself does not fall within the Law of Evidence and Practice in Criminal Cases Act, 1865.¹ §§ 1847a, 1848.

§ 1848.² A *fifth exception* to such general rule is again admitted when such instrument is produced by the *adverse party* pursuant to notice to him so to do, and he *claims a subsisting interest in the cause under such instrument*. In such case, the party producing the instrument is not permitted to call on the other for proof of the execution; for, by claiming an interest under it, he admits its validity.³ But this exception to the general rule only applies when the party producing the deed claims under it *some interest in the subject-matter of the cause*.⁴ Accordingly, where, in an action for commission due to the plaintiff as agent in procuring an apprentice for the defendant, the deed of apprenticeship was produced under notice by the defendant, the plaintiff was held bound to call the attesting witness;⁵ and where a defendant, to prove himself a partner with the plaintiff, called upon him to produce a contract which the partners had made with a builder for work to be done on the plaintiff's premises, and, on plaintiff accordingly producing it, contended that such plaintiff claimed an interest under this instrument, inasmuch as it would enable him, if necessary, to control the builder's proceedings, or to enforce a specific performance against him, proof of the execution was required, probably (though no reasons were assigned by the court) because the interest taken by the plaintiff was certainly not a permanent one, and was not proved to be an existing one.⁶ In any event, it is clear that, to render a document admissible without proof as against the party producing it, his interest under it must be *still*

¹ 28 & 29 V. c. 18, § 7. See *Worthington v. Moore*, 1891, 64 L. T. 338.

² Gr. Ev. § 571, in part, as to first five lines.

³ *Pearce v. Hooper*, 1810, 3 Taunt. 60; *Rearden v. Minter*, 1843, 12 L. J. C. P. 139; *Carr v. Burdiss*, 1835, 4 L. J. Ex. 60; *Orr v. Morice*, 1821, 3 B. & B. 139; *Bradshaw v. Bennett*, 1831, 1 M. & Rob. 143 (*Ld. Tenterden*); *Doe v. Wainwright*, 1836, 5 A. & E. 520; *Bell v. Chaytor*,

1843, 1 C. & Kir. 162; *Doe v. Hemming*, 1826, 9 Dowl. & R. 15. See *Nagle v. Shea*, 1875, Ir. R. 9 C. L. 389.

⁴ *Doe v. M. of Cleveland*, 1829, 9 B. & C. 864; *Curtis v. M'Sweeney*, 1841, Ir. Cir. R. 343.

⁵ *Rearden v. Minter*, 1843, 12 L. J. C. P. 139. See *Gordon v. Secretan*, 1807, 8 East, 548.

⁶ *Collins v. Bayntun*, 1841, 1 Q. B. 117.

**§§ 1848,
1849.**

subsisting at the time of the trial.¹ The exception to the general rule that where an instrument is one requiring attestation, one of the attesting witnesses must usually be called, will, however, prevail where the interest claimed by the party producing the deed *is the same* as that claimed under it by the party who calls for its production.² The fact that the party producing the instrument claims an interest under it, will, moreover, sufficiently appear by a statement to that effect, made by his solicitor shortly before the trial.³ The above exception does not apply, however, where a party, claiming an interest under a deed, has given it up to the adverse side some months,⁴ or perhaps any time,⁵ before the action, for in such a case the party wishing to make it evidence has had the instrument in his own custody, and can therefore well be prepared to prove its execution.

§ 1849. The *sixth exception* to the general rule that where a document is required to be proved to have been duly attested, such attestation must usually be proved by calling an attesting witness, is, that this is not required where the deed is one the very object of which was to create a formal and solemn acknowledgment of a matter which is the very foundation of the cause before the court, for although in general, where an instrument requires attestation, the acknowledgment of its validity by a party to it does not,—as before stated,⁶—waive the necessity of calling one of the attesting witnesses, it, under the circumstances in question, has this effect. Accordingly, where a party agreed to admit a warrant of attorney “so as to enable his opponent to enter up judgment thereon,” the court held that judgment might be entered up without an affidavit of the subscribing witness:⁷ if in an action on covenant the defendant pay money into court on one of the breaches, this is such an admission of the validity of the deed, as to dispense with the production of the attesting witness, though the execution be denied in the statement of defence;⁸ if a party or his solicitor, in order to avoid expense,

¹ *Fuller v. Patrick*, 1849, 18 Ex. 60.
L. J. Q. B. 236.

² *Knight v. Martin*, 1818, Gow, 46.

³ *Roe v. Wilkins*, 1835, 4 A. & E. 86.

⁴ *Vacher v. Cocks*, 1830, 1 B. & Ad. 147.

⁵ *Carr v. Burdiss*, 1835, 4 L. J.

⁶ *Ante*, § 414, and § 1843.

⁷ *Laing v. Kaine*, 1800, 2 Bos. & P. 85 (Ld. Eldon and Heath, J.; Rooke, J., dubitante).

⁸ *Randall v. Lynch*, 1810, 2 Camp. 357.

agree to admit the execution of an instrument which he is called upon by notice to admit, he cannot afterwards require that the attesting witness should be examined;¹ if a party solemnly recites a deed or will in an instrument under his *seal*, and has, moreover, *acquired some benefit* on the faith of the document recited being valid, he cannot compel his opponent, who relies on the recited document, to prove its validity by calling the attesting witness;² and if the effect of a memorandum indorsed upon an original agreement be to incorporate both and to make the whole one new agreement, it will suffice to prove the due execution of the memorandum, and the witness who has attested the original agreement need not be sworn.³

§ 1850. A *seventh exception* prevails, where a document is tendered in evidence as against a public officer, whose legal duty it was to procure its due execution, and who has dealt with it as a document duly executed. For instance, in an action under the old law,⁴ against a sheriff for taking insufficient sureties on a replevin bond, the execution of that instrument need not have been proved by calling the attesting witness, if the plaintiff could show that the sheriff had assigned the bond.⁵

§ 1851.⁶ An *eighth exception* is recognised, where the production of any attesting witness is legally or physically impossible.⁷ Thus, if all⁸ the witnesses be proved to be dead;⁹ or insane;¹⁰ or out of the jurisdiction of the court;¹¹ or if the only available

¹ *Freeman v. Steggall*, 1849, 19 L. J. Q. B. 18. See ante, § 724A, and § 724B.

² *Bringle v. Goodson*, 1839, 8 Scott, 71; *Nagle v. Shea*, 1875, Ir. R. 9 C. L. 389; *Nash v. Turner*, 1795, 1 Esp. 217. See *Fishmongers' Co. v. Robertson*, 1845, 12 L. J. C. P. 185.

³ *Fishmongers' Co. v. Dimsdale*, 1852, 22 L. J. C. P. 44.

⁴ Replevin bonds are now granted by the registrars of County Courts, and the jurisdiction of the sheriffs with respect to them has ceased. See "The County Courts Act, 1888" (51 & 52 V. c. 43), §§ 133—137. They are in *Ireland* (the exemption was formerly general, but is now thus restricted) exempt from stamp duty: 54 & 55 V. c. 39 ("The Stamp Act,

1891"), Sched. (I.) tit. "General Exemptions."

⁵ *Plumer v. Brisco*, 1847, 17 L. J. Q. B. 158; recognising *Scott v. Waithman*, 1822, 3 Stark, R. 168. See *Barnes v. Lucas*, 1825, Ry. & M. 264.

⁶ Gr. Ev. § 572, in some part.

⁷ See ante, §§ 472, 1843.

⁸ As a general rule such proof is required as to *all* the attesting witnesses. See post, § 1856.

⁹ *Adam v. Kerr*, 1798, 1 Bos. & P. 360.

¹⁰ *Currie v. Child*, 1812, 3 Camp. 283; *Bernett v. Taylor*, 1804, 9 Ves. 381. See, also, (1790), 3 T. B. 712 (Buller, J.).

¹¹ *Barnes v. Trompowsky*, 1797, 7 T. R. 265; even though the witness be not proved to be domiciled abroad:

§§ 1851—1853.—attesting witness cannot be found after diligent inquiry;¹ or if he have absented himself from the trial by collusion with the opposite party;² it will be sufficient, but perhaps not necessary in all cases,³ to prove his handwriting. If the instrument be lost, and the name of the subscribing witness be unknown,⁴ the execution must be proved by other evidence.

§ 1852. A *ninth exception* exists where the instrument to be proved bears the seal of a corporation. No witnesses are required to the fixing of such seal, and attestation is not necessary unless the articles of association otherwise provide. The seal may be proved by any person who knows it.⁵ The presumption is that the seal has been properly affixed.⁶

§ 1853. A *tenth exception* has, in several old cases⁷ (but in no modern case), been recognised in respect of *deeds* which have derived validity from their having been *inrolled*.⁸ In practice it is, consequently, usual to admit such deeds on proof of inrolment. The principle of thus admitting them, except as against the party on whose acknowledgment they have been inrolled, has, however, been questioned by Buller, J.;⁹ and in a subsequent case of great

Prince v. Blackburn, 1802, 2 East, 250; notwithstanding the power to examine on interrogatories under Ord. XXXVII. rr. 1 and 5, of R. S. C. 1883: Glubb v. Edwards, 1840, 2 M. & Rob. 300; Wilson v. Collum, 1881, 9 L. R. Ir. 150; and though the witness be out of the jurisdiction: Doe v. Caperton, 1839, 9 C. & P. 116; and Hodnett v. Forman, 1815, 1 Stark. 90. See 26 G. 3, c. 57 ("The East India Company's Act, 1786"), § 38, as to bonds executed in the East Indies. If the witness has set out to leave the kingdom, but the ship has been beaten back, he is still considered absent: Ward v. Wells, 1809, 1 Taunt. 461. See, also, Emery v. Twombly, 1840, 5 Shepl. 65 (Am.).

¹ Cunliffe v. Sefton, 1802, 2 East, 183; Crosby v. Percy, 1808, 1 Taunt. 364; Ld. Falmouth v. Roberts, 1842, 11 L. J. Ex. 180; Parker v. Hoskins, 1810, 2 Taunt. 223; In re Hux, 1877, 46 L. J. P. D. & A. 39; Burt v. Walker, 1821, 4 B. & Ald. 697; Spooner v. Payne, 1847, 16 L. J. C. P. 225. As to such inquiry

see post, § 1855.

² Egan v. Larkin, 1842, 1 Arm. M. & O. 403; Ld. Clanmorris v. Mullen, 1837, Crawford & D. Abr. Cas. 8 (Ir.); Spooner v. Payne, 1847, 16 L. J. C. P. 225.

³ R. v. St. Giles, 1853, 22 L. J. M. C. 54; In re Hux, 1877, 46 L. J. P. D. & A. 39. See, further, post, § 1861.

⁴ Keeling v. Ball, 1796, Peake, Add. Cas. 88.

⁵ Moises v. Thornton, 1799, 8 T. R. 307. But see Doe v. Chambers, 1836, 4 A. & E. 410.

⁶ Clarke v. Imperial Gas Co., 1832, 4 B. & Ad. 315.

⁷ Bro. Abr., Faits enroll. pl. 11, citing P. 7, E. 4, fol. 5, pl. 13, in which that point is distinctly laid down. See, also, Lady Holcroft v. Smith, 1702, 2 Freem. 259; Thurlie v. Madison, 1655, Sty. 462; Smartle v. Williams, 1695, 3 Lev. 387.

⁸ See ante, § 1119 et seq. See, further, as to enrolments, ante, §§ 1646 et seq.

⁹ B. N. P. 255. "If divers persons seal a deed, and one of them acknow-

importance,¹ which was tried twice, and turned upon the validity of a deed inrolled under the Mortmain Act, the precaution was taken of proving the execution of the indenture on both trials. §§ 1853—1855.

§ 1853A. An *eleventh exception* to the general rule, requiring that, where attestation is necessary, the execution of a document shall be proved by one of the attesting witnesses, arises, as will be recollected,² under the Merchant Shipping Act.³

§ 1854. Where an instrument requiring attestation is subscribed by several witnesses, it is, in general, only necessary to call *one* of them.⁴ In the case of *wills* relating to real estate, it was for many years the practice of courts of equity, and is now the practice of all the courts,⁴ to require that all the witnesses who are in England, and capable of being called, should be examined.⁵ The reasons for this appear to substantially be, that frauds are frequently practised upon dying men, whose hands have survived their heads,—that therefore the sanity of the testator is the great fact to which the witnesses must speak when they come to prove the attestation,—and that the heir-at-law has a right to demand proof of this fact from every one of the witnesses whom the statute has placed about his ancestor.⁶

§ 1855.⁷ The *degree of diligence* required in seeking for the attesting witnesses to a document, the attestation of which is

ledges it, it may be inrolled, and may ever after be given in evidence as a deed inrolled; but it would be of very mischievous consequence to say, therefore, that a deed, inrolled upon the acknowledgment of a bare trustee, might be given in evidence against the real owner of the land without proving it executed by him. However, that has been the general opinion, and it seems fortified in some degree by 10 A. c. 18." See ante, § 419.

¹ Doe v. Lloyd, first tried (Cole-ridge, J.) Spring Assizes, 1839, 5 Bing. N. C. 741; and second trial (Gurney, B.) Summer Assizes, 1839, 10 L. J. C. P. 128.

² Ante, §§ 1839—41, n., title "Shipping Documents."

³ Holdfast v. Dowsing, 1746, 2 Str. 1254; B. N. P. 264; Hindson v. Kersey, 1765, 4 Burn. Ecc. L. 118 (Ld. Camden); Gresl. Ev. 120;

Forster v. Forster, 1864, 33 L. J. P. & M. 113; Belbin v. Skeats, 1858, 27 L. J. P. & M. 56. See ante, § 393.

⁴ "Jud. Act, 1873" (36 & 37 V. c. 66), § 25, sub-s. 11, and decisions on it cited ante, § 5, n.

⁵ M'Gregor v. Topham, 1850, 3 H. L. C. 155 (Ld. Brougham); Bootle v. Blundell, 1815, 19 Ves. 494; Grayson v. Atkinson, 1752, 2 Ves. Sen. 459; Townsend v. Ives, 1748, 1 Wils. 216; Ogle v. Cook, 1748, 1 Ves. Sen. 177; Andrew v. Motley, 1862, 32 L. J. C. P. 128.

⁶ Ld. Camden, in Hindson v. Kersey, 1765, rep. in 4 Burn, Ec. L. 116, 119, 120, and cited Gresl. Ev. 123; Bowman v. Bowman, 1843, 2 M. & Rob. 501; Andrew v. Motley, 1862, 32 L. J. C. P. 128.

⁷ Gr. Ev. § 574, in part, as to first nine lines.

§§ 1855,
1856.

required to be proved by an attesting witness, is the same as in the search for a lost paper.¹ The principle is in both cases identical. The inquiry must be strict, diligent, and honest, and in all respects satisfactory to the court under all the circumstances. It should be made at the residence of the witness, if known, and at all other places where he may be expected to be found; as also, in general, of his relatives and others, who may be supposed capable of affording information respecting him. Evidence that the required witness cannot be found is given, if it be shown that the sole attesting witness, having been charged with a serious offence, has absconded, and cannot be found, though inquiries have been made for him at his house, and at the inns which he was in the habit of frequenting, although no application was shown to have been made to any member of his family;² that inquiry has been made at the residences of the parties to the instrument respecting the witness, and that no account could be obtained as to who he was, or where he lived, —though it was urged that, in such a case, a public advertisement for him should have been inserted in the newspapers;³ or that the attesting witness, on being subpoenaed for the plaintiff, said that he would not attend, that the trial has been already put off on account of his absence, and that in the interval search has been made for him at the house of his employer, and in its neighbourhood, as well as in the place to which such employer stated that he had gone.⁴ In all cases of this nature, the answers to the inquiries may be given in evidence, they being not hearsay, but parts of the *res gestæ*.⁵

§ 1856.⁶ If an instrument be necessarily attested by *more than one witness*, the *absence of them all* must be duly accounted for, in order to let in secondary evidence of the execution;⁷ but when

¹ Ante, § 429.

² *Earl of Falmouth v. Roberts*, 1842, 11 L. J. Ex. 180.

³ *Cunliffe v. Sefton*, 1802, 2 East, 183.

⁴ *Burt v. Walker*, 1821, 4 B. & Ald. 697. For other instances, see *Wardell v. Fermor*, 1809, 2 Camp. 282; *Willman v. Worrall*, 1838, 8 C. & P. 380; *Wyatt v. Bateman*, 1836, 7 C. & P. 586; *Doe v. Powell*, 1836, 7 C.

& P. 617; *Kay v. Brookman*, 1828, 3 C. & P. 555; *Morgan v. Morgan*, 1832, 2 L. J. C. P. 27; *Spooner v. Payne*, 1847, 16 L. J. C. P. 225; *Austin v. Rumsey*, 1849, 2 C. & K. 736; and also *Cunliffe v. Sefton*, and other cases cited ante, § 1851, n.

⁵ As to which see ante, § 472—S, n.

⁶ Gr. Ev. §§ 574, 575, in part, as to first seven lines.

⁷ *Cunliffe v. Sefton*, 1802, 2 East,

such evidence is rendered admissible, proof of the handwriting of any *one* of the *witnesses* will, in general, be deemed sufficient, provided it be accompanied by some *evidence* of the *identity* of the party sued, with the person who appears to have executed the instrument.¹ Proof of the signature of the obligor is an obvious, though by no means the only, mode of establishing his identity.

§ 1857. The attesting witness must absolutely prove the *identity* of the party to the instrument with that of the party to the dispute. For this reason the plaintiff was non-suited in an action² by the indorsee against the maker of a note, in which the attesting witness only stated that he saw a party called Hugh Jones, who kept the Glasgow Tavern at Llangefni, in Anglesea, sign the note, but admitted, on cross-examination, that he had not seen this person since, and that the name was a common one in Anglesea, and this notwithstanding that the defendant had in one of his pleas admitted the making of the note, Parke, B., observing that the defendant's solicitor should have been called, to say whether the person who employed him in the case was the Hugh Jones who lived at the Glasgow Tavern. In the same year, however, in a somewhat similar action against the acceptor of a bill, which was directed to "Charles Banner Crawford, East India House," and accepted "C. B. Crawford," a witness having proved that this acceptance was the signature of Charles Banner Crawford, who was formerly a clerk in the East India House, but said that he did not know whether that Mr. Crawford was the defendant, his evidence was held to furnish sufficient *prima facie* proof of identity, at least in the absence of an affidavit to show that the defendant was not that person.³

§ 1858. In an action by an apothecary for medicines and attendance, a licence from the Apothecaries' Company, granted to a person bearing his name, was held to render unnecessary further evidence to show that he was the party named in the

183; *Wright v. Doe d. Tatham*, 1834, 1 A. & E. 21, 22; *Whitelocke v. Musgrove*, 1833, 1 C. & M. 511.

¹ *Adam v. Kerr*, 1798, 1 Bos. & P. 360; *Nelson v. Whittall*, 1817, 1 B. & Ald. 19; *Doe v. Paul*, 1829, 3 C. & P. 613.

² *Jones v. Jones*, 1841, 11 L. J. Ex.

265.

³ *Greenshields v. Crawford*, 1842, 1 Dowl. N. S. 439. The distinction between these two cases appears to be that, in the former, the name of Hugh Jones was said to be common, whereas that of Charles Banner Crawford was certainly unusual.

§§ 1858—
 1859a. licence;¹ where the question was whether the defendant was proved to be the same person as had been the defender in a Scotch suit, the judges decided that there was ample evidence of identity, on the ground that the peculiar names (of William Gray Smythe), professions, places of abode, and ages of the parties appeared to be the same;² in an action³ for negligence in navigation, on its being objected that the evidence did not show that the defendant was the pilot in charge of the vessel, plaintiff's counsel called out "Mr. Henderson," and a man in court answered "Here; I am the pilot," and it having been then proved that this man, at the time of the accident, was acting as pilot, a nonsuit was set aside. In this last case, Parke, B., during the argument, observed, "*similarity of name and residence, or similarity of name and trade, will do;*" and he added in the judgment, "The defendant is sued on the face of the *declaration* as William Henderson, a pilot. A man in court answers to the name of Henderson, is a pilot, and was proved to be the pilot acting on board the vessel. He therefore fulfils the description in the *declaration*, in two respects at least, since his name and calling resemble those of the alleged defendant."⁴

§ 1859. It is submitted, however, that the above decision was right, not for the reason given by Parke, B., but because the accident was proved to have been caused by a pilot named Henderson, and a person answering the name and description was *present in court*, and might therefore be fairly presumed to be the same Mr. Henderson who had pleaded to the action. It is obvious that the identity which is required to be shown is not that of some one with the description which the plaintiff has chosen to give, but that of the person who was served with the writ in the court, and who has pleaded to the action with the defendant.

§ 1859A. Other cases on the subject of proof of the identity of a defendant, are, that where a witness, called to prove the defendant's handwriting, said that he had corresponded with a person bearing defendant's name, who dated his letters from Plymouth

¹ Simpson v. Dismore, 1841, 11 L. J. Ex. 137.

² Russell v. Smythe, 1842, 11 L. J. Ex. 308.

³ Smith v. Henderson, 1842, 11

L. J. Ex. 315.

⁴ In the judgment in Smith v. Henderson, as reported 9 M. & W. 801.

Dock, where defendant resided, and where it appeared that no other person of the same name lived, the evidence of identity was held to be sufficient; ¹ and that where ² the only proof of the defendant's signature to a bill was given by a banker's clerk, who stated that two years before the trial he saw a person—whom he did not know, but who called himself by that name—sign it: that he had since seen cheques similarly signed pass through the banking house, and that he thought the handwriting was the same as that on the bill,—the evidence, weak as it confessedly was, was allowed to be submitted for the consideration of the jury.

§§ 1859a
—1861.

§ 1860. It is, however, now well established that in ordinary cases, where no particular circumstance tends to raise a question as to the party being the same, *mere identity of name is something from which an inference of identity may be drawn.*³ If the party to be fixed with liability be a marksman,⁴ or if his name be proved to be very common in the country,⁵ or if a length of time has elapsed since the name was signed, or if, in short, any other special facts be involved in the case, a stricter proof might be required. Lord Denman,⁶ in dealing with an objection that there had been no sufficient proof of identity,—after stating that the onus of proving a negative might, in the generality of cases, be safely thrown upon the defendant, partly, because the proof was easy, and partly, because the supposition that a wrong man had been sued was unreasonable, inasmuch as the fraud would occur to few, and the risk of punishment in practising the fraud would be great,—emphatically added,⁶ “The transactions of the world could not go on if such an objection were to prevail. It is unfortunate that the doubt should have been raised; and it is best that we should sweep it away as soon as we can.”

§ 1861. In America, where the absence of the subscribing witnesses has been duly accounted for, an instrument may be read

¹ *Harrington v. Fry*, 1824, Ry. & M. 90.

² *Warren v. Sir J. C. Anderson, Bart.*, 1839, 8 Scott, 384.

³ See *Sewell v. Evans*, 1843, 12 L. J. Q. B. 276; *Roden v. Ryde*, 1843, 12 L. J. Q. B. 276; recognised in another court: *Hamber v. Roberts*, 1849, 18 L. J. C. P. 250. See, also, *Murieta v. Wolfhagen*, 1849, 2 C. &

K. 744; and *Reynolds v. Staines*, 1849, 2 C. & K. 745.

⁴ As in *Whitelocke v. Musgrove*, 1833, 1 C. & M. 511.

⁵ As in *Jones v. Jones*, 1841, 11 L. J. Ex. 265, ante, § 1857. See, also, *Barker v. Stead*, 1847, 16 L. J. C. P. 160.

⁶ In *Sewell v. Evans*, 1843, as reported 4 Q. B. 633.

§§ 1861— upon proof of the handwriting of the obligor, or party by whom it
1863. was executed; but it seems to be still undecided in that country, whether such proof will be admissible, without first showing an inability to prove the signatures of the witnesses.¹

§ 1862. When writings are produced, and it becomes necessary to show by whom they were written or signed, the simplest mode of proof is to call the *writer* himself, or some person who *actually saw the paper* or signature written. When evidence such as this cannot be procured, as must often be the case, recourse may be had, either to the testimony of witnesses, who are *acquainted with the handwriting*, or to a comparison of the document in dispute with any writing proved to the satisfaction of the judge to be genuine.² These last modes of proof, indeed, may in all cases be given in the first instance, since the law recognises no distinction between them and the ocular proof just mentioned; but as they are obviously of a less satisfactory character than direct testimony, any unnecessary reliance on them is calculated to raise suspicion that the party is actuated by some improper motive in withholding evidence of a more conclusive nature.

§ 1863. The *knowledge of a person's handwriting* may have been acquired in both or either of two ways.³ The *first is from having seen him write*; and though the weight of the evidence, which depends upon knowledge so obtained, must of course vary in degree according to the number of times that the party has been seen to write, the interval that has elapsed since the last time, the circumstances, whether of hurry or deliberation, under which he wrote, and the opportunities and motives which the witness had for observing the handwriting with attention;⁴—yet the evidence will be admissible, though the witness has not seen the party write for twenty years,⁵ or has seen him write but once, and then only his surname.⁶ Indeed, on one occasion, a witness

¹ Jackson v. Waldron, 1834, 11 Wend. 178 (Am.); Valentine v. Piper, 1839, 22 Pick. 90 (Am.). See R. v. St. Giles, 1853, 22 L. J. M. C. 54, as to English law.

² See post, § 1869.

³ See 3 Benth. Ev. 598, 599.

⁴ Doe v. Suckermore, 1836, 5 A. & E. 703, 730.

⁵ R. v. Horne Tooke, 1795, 25

How. St. Tr. 71, 72; Eagleton v. Kingston, 1803, 8 Ves. 473 (Ld. Eldon).

⁶ Patteson, J., in Doe v. Suckermore, 1836, 5 A. & E. 703, 730: Garrells v. Alexander, 1801, 4 Esp. 37; Willman v. Worrall, 1838, 8 C. & P. 380; Burr v. Harper, 1816, Holt, N. P. 420; Lewis v. Sapio, 1827, M. & M. 39. In this last case,

was permitted to speak to the genuineness of a person's *mark*, from having frequently seen it affixed by him on other documents.¹ The proof in such cases may be very slight, but the jury will be allowed to weigh it. The witness need not state in the first instance how he knows the handwriting, since it is the duty of the opposite party to explore on cross-examination the sources of his knowledge, if he be dissatisfied with the testimony as it stands.² Still, the party calling the witness may interrogate him, if he thinks proper, as to the circumstances on which his belief is founded. If it should appear that a witness's belief as to handwriting rests on the probabilities of the case, or on the character or conduct of the supposed writer, and not on the actual knowledge of it, the testimony will be rejected.³ Where a witness, called to establish a forgery, had become acquainted with the signature of the party, from having seen him, after the commencement of the suit, sign his name for the purpose of showing the witness his true manner of writing it, the evidence was held inadmissible, Lord Kenyon observing, that the party might, through design, have written differently from his common mode of signature.⁴

§§ 1863,
1864.

§ 1864. The *second way* in which the knowledge of a person's handwriting may be acquired, is by the *witness having seen, in the ordinary course of business, documents*, which by some evidence, direct or circumstantial, are proved to have been written by such person. Thus, if the witness has received letters purporting to be in the handwriting of the party, and has either personally communicated with him respecting them, or written replies to them, producing further correspondence, or acquiescence by the party in some matter to which they relate, or has so adopted them into the ordinary business transactions between himself and

Ld. Tenterden refused to recognise the authority of *Powell v. Ford*, 1817, 2 Stark. R. 164, where Ld. Ellenborough rejected the testimony of a witness who had seen the defendant write his surname only once, the acceptance of the bill in question having been signed at full length. See, also, *Warren v. Anderson*, 1839, 8 Scott, 384.

¹ *George v. Surrey*, 1830, M. & M.

516 (Tindal, C.J., after some hesitation).

² *Moody v. Rowell*, 1835, 17 Pick. 419; overruling *Slaymaker v. Wilson*, 1829, 1 Penrose & Watts, 216.

³ *R. v. Murphy*, 1837, 8 C. & P. 310; *Da Costa v. Pym*, 1797, Pea. Add. Cas. 144.

⁴ *Stanger v. Searle*, 1793, 1 Esp. 15. See also *Page v. Homans*, 1837, 2 Shepl. 478.

§§ 1864—
1866.

the party, as to induce a reasonable presumption in favour of their genuineness, his evidence will be admissible.¹ It is always a fair presumption that, if a letter be sent to a particular person, and an answer be received in due course, the answer was written by the person addressed in the letter; and, consequently, a witness who received such answer, may be examined as to the genuineness of any other paper which it is necessary to show was or was not written by the same person.² Again, the clerk who has constantly read the letters, or the broker who has been consulted upon them, is as competent as the merchant to whom they were addressed, to judge whether another signature is that of the writer of the letters; and so is a servant who having habitually carried his master's letters to the post, has thereby had an opportunity of obtaining a knowledge of his writing, though he never saw him write, or received a letter from him.³

§ 1865. It is not clear whether a solicitor can speak to the signature of a person when his knowledge of the handwriting is solely derived from having seen the same signature attached to other documents which have been used in the cause.⁴

§ 1866. In an action on a joint and several promissory note against three persons, the signature of one of them cannot be proved by calling the solicitor for the defendants, whose knowledge of the handwriting in question is founded on the circumstance, that he has received a retainer purporting to be signed by his three clients, and had acted upon it in defending the action, if no proof be given that the party has ever acknowledged the signature to the solicitor—since either of the other two defendants may have signed the retainer for him with his assent;⁵ neither can the signature of a person entitled

¹ *Doe v. Suckermore*, 1836, 5 A. & E. 703, 731; *Ld. Ferrers v. Shirley*, 1730, Fitzg. 195; *Carey v. Pitt*, 1797, Pea. Add. Cas. 130; *Tharpe v. Gisburne*, 1825, 2 C. & P. 21; *Harrington v. Fry*, 1824, Ry. & M. 90; *Burr v. Harper*, 1816, Holt. N. P. 420; *Com. v. Carey*, 1823, 2 Pick. 47; *Johnson v. Daverne*, 1821, 19 Johns. 134; *Pope v. Askew*, 1840, 1 Iredell, 16.

² *Carey v. Pitt*, 1797, Pea. Add.

Cas. 130.

³ *Doe v. Suckermore*, 1836, 5 A. & E. 703, 740.

⁴ That such evidence is admissible, see *Smith v. Sainsbury*, 1832, 5 C. & P. 196 (Park, J.), cited (*Ld. Denman*) in *Doe v. Suckermore*, 1836, 5 A. & E. 703, 740. But see, *contra*, *Greaves v. Hunter*, 1826, 2 C. & P. 477 (Abbott, C.J.).

⁵ *Drew v. Prior*, 1843, 5 M. & Gr. 264.

to frank his letters be proved by the evidence of an inspector of franks, whose knowledge of the handwriting has been simply derived from his having frequently seen franks pass through the post-office, bearing the name of the person in question, but who has never communicated with the person on the subject of the franks—for the superscriptions of the letters seen by the witness might possibly have been forgeries.¹

§§ 1866—
1869.

§ 1867. In whichever of the two ways mentioned above the witness has acquired his knowledge of handwriting, it is obvious that evidence identifying the person whose writing is in dispute with the person whose hand is known to the witness, must be adduced, either *aliundè*, or by the testimony of the witness himself, if he be personally acquainted with the writer.² The witness might otherwise be proving the handwriting of one man, while the party calling him might be seeking to establish the signature of another.

§ 1868. Witnesses called to speak to handwriting must, it is submitted, declare their *belief* that it is genuine.³ No doubt witnesses are occasionally pressed too much to form a belief;⁴ and some allowance should certainly be made for the over-caution of a scrupulous witness. Consequently it may be very proper to receive the testimony of a person, who, while declining to express a decided belief, will yet declare that he is of *opinion*, or that he *thinks*, the paper is genuine. But it is going a step further when the witness will only state that the handwriting is like; for the statement may be perfectly true, but yet, within the knowledge of the witness, the paper may have been written by an utter stranger.

§ 1869. Although all proof of handwriting, except when the witness either wrote the document himself, or saw it written, is in its nature comparison;—it being the belief which a witness

¹ *Carey v. Pitt*, 1797, Pea. Add. Cas. 130; *Batchelor v. Honeywood*, 1799, 2 Esp. 714.

² See *Doe v. Suckermore*, 1836, 5 A. & E. 703, 731 (*Patteson, J.*).

³ *Eagleton v. Kingston*, 1803, 8 Ves. 476. *Ld. Kenyon*, indeed (in *Garrells v. Alexander*, 1801, 4 Esp. 37), admitted the evidence of a witness who could only say that the

handwriting was “like” that of the person whose it was said to be. *Ld. Wynford* is also said (see 2 Ph. Ev. 304, n. ¹) to have followed this ruling of *Ld. Kenyon*’s. See, also, on this question, *Beauchamp v. Cash*, 1822, Dowl. & Ry. N. P. 3; and *Cruise v. Clancy*, 1844, 6 Ir. Eq. R. 552.

⁴ *Ld. Eldon*, in *Eagleton v. Kingston*, 1803, 8 Ves. 438.

§§ 1869,
1870.

entertains, upon comparing the writing in question with an exemplar formed in his mind from some previous knowledge¹—yet the law, until the year 1854, did not allow the witness, or even the jury, except under certain special circumstances, actually to *compare two writings* with each other, in order to ascertain whether both were written by the same person. This technical rule was peculiar² to English common law. So far as Nisi Prius trials were concerned it was abrogated in 1854 by the C. L. P. Act of that year.³ And in 1865 it was enacted by the Evidence and Practice in Criminal Cases Amendment Act, 1865,⁴—which, by § 1 thereof, extends to “all courts of judicature as well criminal as all others, and to all persons having by law or by consent of parties authority to hear, receive, and examine evidence,” whether in England or Ireland⁵—that⁶ “comparison of a disputed writing with any writing proved to the satisfaction of the *judge* to be genuine, shall be permitted to be made by witnesses; and such writings, and the evidence of witnesses respecting the same, may be submitted to the court and jury as evidence of the genuineness, or otherwise, of the writing in dispute.”⁷

§ 1870. Under this Act it seems clear, first, that any writings, the genuineness of which is proved to the satisfaction, not of the

¹ Doe v. Suckermore, 1836, 5 A. & E. 703, 731 (Patteson, J.).

² It was directly opposed to the practice permitting a comparison of handwriting existing in our own ecclesiastical courts (1 Will. on Ex. 309; 1 Ought. tit. 225, §§ 1—4; Doe v. Suckermore, 1836, 5 A. & E. 703, 708 (Coleridge, J.); Beaumont v. Perkins, 1809, 1 Phillim. 78; Saph v. Atkinson, 1822, 1 Add. 215; Machin v. Grindon, 1756, 2 Lee, 335); in our courts in India (see now “The Indian Evidence Act, 1872,” § 73); in the French courts (Code de Proc. Civ. Part 1, liv. 2, tit. 10, §§ 193—213; 3 Poth. Cenvr. Poth. 46; Doe v. Suckermore, 1836, 5 A. & E. 703, 710 (Coleridge, J.)); and in the courts of many of the most enlightened States in America (see the N. York Civ. Code, §§ 1763—1765). In Massachusetts, Maine,

and Connecticut, it seems to have become the settled practice to admit any papers to the jury, whether relevant to the issue or not, for the purpose of comparison of the handwriting: Homer v. Wallis, 1814, 11 Mass. 309 (Am.); Moody v. Rowell, 1835, 17 Pick. 490 (Am.); Richardson v. Newcomb, 1838, 21 Pick. 315 (Am.); Hammond’s case, 1822, 2 Greenl. 33 (Am.); Lyon v. Lyman, 1831, 9 Conn. 55 (Am.).

³ 17 & 18 V. c. 125, §§ 27, 103 (now repealed). See, also, 19 & 20 V. c. 102, § 98, Ir.

⁴ 28 & 29 V. c. 18.

⁵ The Act does not extend to Scotland: § 10.

⁶ § 8 of 28 & 29 V. c. 18.

⁷ This rule has been adopted by the Committee for Privileges in the House of Lords: Shrewsbury Peer., 1857, 7 H. L. C. 1, 15.

jury, but of the judge,¹ may be used for the purposes of comparison, although they may not be admissible in evidence for any other purpose in the cause;² and, next, that the comparison may be made either by witnesses acquainted with the handwriting or by witnesses skilled in deciphering handwriting, or, without the intervention of any witnesses at all, by the jury themselves,³ or, in the event of there being no jury, by the court. Therefore, in an action by the indorsee of a bill of exchange against the acceptor, who by his statement of defence denies the endorsement by the drawer, the jury may, by simply comparing the indorsement with the drawing, which is conclusively admitted to be genuine,⁴ find a verdict for the plaintiff, even though no witness be called to disprove the defence.⁵

§§ 1870,
1871.

§ 1871. It further appears, that any person whose handwriting is in dispute, and who is present in court, may be required by the judge to write in his presence, and that such writing may, under the statute, then be compared with the document in question.⁶ Moreover, in all cases of comparison of handwriting, the jury and the court may exercise their judgment on the resemblance or difference of the writings produced. In doing so, aid may be given them by the evidence of experts with respect to the general character of the handwriting,—the forms of the letters, and the relative number of diversified forms of each letter,—the use of capitals, abbreviations, stops, and paragraphs,—the mode of effecting erasures, or of inserting interlineations or corrections,—the adoption of peculiar expressions,—the orthography of the words,—the grammatical construction of the sentences,—and the style of the composition,—and also on the fact of one or more of the documents being written in a feigned hand.⁷

¹ See *Egan v. Cowan*, 1858, 30 L. T. O. S. 223 (Ir.).

² *Birch v. Ridgway*, 1858, 1 F. & F. 270; *Cresswell v. Jackson*, 1860, 2 F. & F. 24.

³ *Cobbett v. Kilminster*, 1865, 4 F. & F. 490.

⁴ Ante, § 851.

⁵ See, as to the former law: *Allport v. Meek*, 1830, 4 C. & P. 267.

⁶ See *Doe d. Devine v. Wilson*, 1855, 10 Moore, P. C. C. 527; *Cobbett v. Kilminster*, 1865, 4 F. &

F. 490. "The Indian Evidence Act, 1872," contains a similar provision in § 73.

⁷ "The Handwriting of Junius professionally investigated by Mr. Charles Chabot, Expert." is the most instructive and scientific essay that has ever been published in English respecting the best methods to be adopted in comparing handwritings. It deserves most attentive study, and quite exhausts the subject. See *Handw. of Jun. by Twistleton &*

§§ 1872,
1873-4.

§ 1872. Many men are capable of writing in several different hands; and, consequently, when the object they have in view is to relieve themselves from liability, nothing can be easier than to produce to the jury genuine documents, which have been written for the express purpose of proving that no similitude exists between them and the writing in dispute. The statute under consideration contains no check upon this.¹

§§ 1873—4. When *documents* are of such *antiquity* that witnesses who have corresponded with the supposed writer, or who have seen him write, cannot be produced, the law will, from necessity, be satisfied with less strict proof than is required in other cases.² Such documents, when thirty years old, generally prove themselves;³ but occasions may arise when, in order to establish identity, it will become necessary to prove the handwriting. For instance, if in a pedigree cause, or a peerage claim, a declaration purporting to have been written by a deceased member of the family, be tendered in evidence, the handwriting must be proved in some legal mode, however ancient the paper may be,⁴ and then the question will arise how this is to be done. Doubtless, under the Evidence and Practice in Criminal Cases Amendment Act, 1865,⁵ the proof may be established by producing from the proper custody other documents admitted to be genuine, or proved to have been respected, treated, and acted upon as such by the parties interested in them, and by then permitting witnesses, whether experts or others, and the court and jury, to compare such documents directly with the paper in dispute.⁶

Chabot, 4to., published by Murray, in 1871. As to the evidence of expert witnesses generally, see ante, §§ 58, 68.

¹ Ld. Brougham's Bill of 1853 contained the following clause to avoid this evil:—"Where the handwriting of any person is sought to be *disproved* by comparison with other writings of his, not admissible in evidence for any other purpose in the cause, such writings, before they can be compared with the document in question, must, if sought to be used by the party in whose handwriting they are, be proved to have been written prior to any dispute respecting the genuineness of such

document." See ante, § 1863. ad fin.

² Doe v. Suckermore, 1836, 5 A. & E. 703, 717, 724, 736, 748 (Coleridge, Williams, and Patteson, JJ.; and Ld. Denman).

³ Ante, §§ 87, 88.

⁴ Tracy Peer., 1839-43, 10 Cl. & Fin. 154 (H. L.); Fitzwalter Peer., 1843, 10 Cl. & Fin. 193 (H. L.); Morewood v. Wood, 1811, 14 East. 328; Taylor v. Cook, 1820, 8 Price. 652.

⁵ 28 & 29 V. c. 18, § 8. set out ante, § 1869.

⁶ This course was allowable to a great extent under the old law. See Davies v. Lowndes, 1843, 12 L. J.

§ 1875. It is also clear from a decision of the House of Lords,¹ that, without the production of any documents for the purpose of instituting a direct comparison, the handwriting under investigation may be proved by any witness who has become acquainted with it in the *ordinary course of his business*. It having become necessary to show that a family pedigree, produced from the proper custody, and purporting to have been made some ninety years before by an ancestor of the claimant, was written by him, the family solicitor of the claimant was called to establish this fact. On his stating that he had acquired a knowledge of the ancestor's writing, from having had occasion at different times to examine, in the course of his business, many deeds and other instruments purporting to have been written or signed by him, the Lords considered this witness competent to prove the handwriting of the pedigree. These principles were also given effect to in another case,² which further shows that where the writing is eighty-five years old, it is not necessary that any witness should be called to speak to the death of the writer, or to show when he died, or that any search should have been made for persons who might have seen him write, or have been able to prove his signature in the ordinary way.

§ 1876. The question still remains, whether a witness in such cases as those just put, can be called to state that he has acquired knowledge of the handwriting in question, *not* from a *course of business*, like a party's solicitor or steward, but from *studying* the signatures attached to documents, which are either admitted or proved to be genuine, but which are *not produced*, for the *express purpose* of speaking to the identity of the writer. The House of Lords³ has,—in apparent opposition to several older authorities,⁴—decided that such testimony is inadmissible, and

§§ 1875,
1876.

C. P. 506; *Doe v. Tarver*, 1824, Ry. & M. 141 (Abbott, C.J.); Anon., undated, cited id. (Lawrence, J.); *Roe v. Rawlings*, 1806, 7 East, 282, n. (Le Blanc, J.), on two occasions; *Morewood v. Wood*, 1811, 14 East, 328 (Hotham, B.); *Taylor v. Cook*, 1820, 8 Price, 652 (Richards, C.B.).

¹ *Fitzwalter Peer.*, 1843, 10 Cl. & Fin. 193 (H. L.). See Crawford and Lindsay Peer., 1848, 2 H. L. C.

556.

² *Doe v. Davies*, 1847, 16 L. J. Q. B. 218.

³ In the *Fitzwalter Peerage case*, 1843, 10 Cl. & Fin. 193 (H. L.).

⁴ See *Sparrow v. Farrant*, 1819, 2 St. Ev. 517, n. (Holroyd, J.); *Doe v. Lyne*, 1822, 2 Ph. Ev. 258, n. 1 (id.); *Beer v. Ward*, 1821, cited id. (Dallas, C.J., and Ld. Tenterden); Anon., 1846, cited Bull. N. P. 236, b

§§ 1876— the modern legislation as to proof of handwriting,¹ does not seem
1878. to have interfered with this decision.

§ 1877. Independently of cases in which handwriting is sought to be proved by actual comparison, the testimony of skilled witnesses will occasionally be admissible for the purpose of throwing light upon a document which is in dispute. In the first place, if a writing be *ancient*, an expert may state his belief as to the probable *period* at which it was written, for the character of handwriting varies according to the progress of civilisation, and antiquarian knowledge, consequently, affords much assistance in arriving at a conclusion as to the value of a document.² In the second place, if a question arise whether a paper is written in a *feigned* or a *natural* hand,³ the opinions of witnesses whose duty it has been to detect forgeries will be admissible in this country,⁴ as they are in America,⁵ as such persons are more capable of pronouncing a safe opinion on this subject than ordinary men.⁶ Still, as experts usually come with a bias on their minds to support the cause in which they are embarked, little weight will in general be attached to the evidence which they give,⁷ unless it be obviously based on sensible reasoning.

§ 1878. In ordinary cases, when a witness is called to speak to handwriting, the document itself is produced in court. This course may, however, occasionally be highly inconvenient or even impossible. For instance, suppose it necessary to identify a person, who has either written a paper which is lost, or has signed a record or public register, the removal of which from its

(Ld. Hardwicke); *Doe v. Suckermore*, 1836, 5 A. & E. 703.

¹ Set out ante, § 1869.

² *Doe v. Suckermore*, 1836, 5 A. & E. 703, 718 (Coleridge, J.); *Tracy Peer.*, 1839-43, 10 Cl. & Fin. 154 (H. L.).

³ Those interested in tracing a similarity between feigned and natural handwriting, will find in the 4th vol. of Ld. Chatham's *Corresp.* (at p. 37 of the fac-similes of autographs), a curious comparison of the upright writing of Junius with the running-hand of Sir Ph. Francis. See, also, ante, § 1871, n.

⁴ *R. v. Coleman*, 1852, 6 Cox, C. C. 163.

⁵ *Hammond's case*, 1822, 2 Greenl. 33 (Am.); *Moody v. Rowell*, 1835, 17 Pick. 490 (Am.); *Com. v. Carey*, 1823, 2 Pick. 47 (Am.); *Lyon v. Lyman*, 1831, 9 Conn. 55 (Am.); *Lodge v. Phipper*, 1824, 11 Serg. & B. 333 (Am.).

⁶ *E. v. Cator*, 1802, 4 Esp. 117, 145; *Goodtitle v. Braham*, 1792, 4 T. R. 497; *Doe v. Suckermore*, 1836, 5 A. & E. 703; *Fitzwalter Peer.*, 1843, 10 Cl. & Fin. 198 (H. L.) (Ld. Brougham).

⁷ *Tracy Peer.*, 1839-43, 10 Cl. & Fin. 191 (H. L.) (Ld. Campbell); *Gurney v. Langlands*, 1822, 5 B. & Ald. 330.

proper place of custody cannot be enforced. In such cases the witness may be allowed to prove such person's handwriting without producing the original document.¹ §§ 1878—1880.

§ 1879. To facilitate the reading of documents on trials in the County Courts, a Rule provides as follows :—"Where any documents, which would, if duly proved, be admissible in evidence, are produced to the court from proper custody, they shall be read without further proof, if, in the opinion of the judge, they appear genuine, and if no objection be taken thereto; and if the admission of any document so produced be objected to, the judge may adjourn the hearing for the proof of the documents, and the party objecting shall pay the costs caused by such objection, in case the documents shall afterwards be proved, unless the judge shall otherwise order."²

§ 1880.³ The *admissibility* and *effect* of private writings, when offered in evidence, have been incidentally considered, under various heads, in the preceding pages so far as they are established and governed by any rules of law.

¹ Sayer v. Glossop, 1848, 17 L. J. Ex. 300.

² C. C. R. 1903, Ord. XVIII, r. 9.

³ Gr. Ev. § 583, in part.

PART VI.

SOME GENERAL RULES AS TO THE ADMISSION OR
REJECTION OF EVIDENCE AT THE TRIAL, AND AS
TO THE ADMISSIBILITY OF FURTHER EVIDENCE
ON APPEAL.

§§ 1881—
1881c.

§ 1881. The present work may usefully be concluded by stating the general rules which exist with regard to the admission or rejection of evidence at the trial, and as to the admissibility of further evidence on appeal.

§ 1881A. The general rules which exist as to the admission or rejection of evidence at the trial are, principally, six.

§ 1881B. *First*, where evidence is offered for a *particular purpose* and an objection is taken to its admissibility for that purpose, if the judge pronounce in favour of its *general admissibility* in the cause, the court will support his decision, provided the evidence be admissible for *any purpose*.¹ The opposing counsel should in such a case call upon the judge to explain to the jury that the evidence, though generally admissible in the cause, furnishes no proof of the particular fact in question; and then, should the judge refuse to make the explanation required, an application might be made to the court above for a new trial on the ground of misdirection.²

§ 1881c. *Secondly*, as to cases where inadmissible evidence is received at the trial. Here, if in a *civil* case such evidence be received *without objection*, the opposite party cannot afterwards object to its having been received,³ or obtain a new trial on the ground that the judge did not expressly warn the jury to place no

¹ The Irish Society v. Bp. of Derry, 1845-6, 12 Cl. & Fin. 666 (H. L.).

² Id. (Ld. Brougham).

³ Reed v. Lamb, 1860, 29 L. J. Ex. 452.

reliance upon it.¹ But if, in a *criminal* case, inadmissible evidence be in fact received, and left to the jury, a conviction is bad, even where there is sufficient other evidence to sustain it.² §§ 1881c —1882a.

§ 1881d. *Thirdly*, where evidence is objected to at the trial, the *nature of the objections* must be distinctly stated, whether an exception be entered on the record or not;³ and on either moving for a new trial on account of its improper admission, or on arguing the exception, the counsel will not be permitted to rely on any other objections than those taken at *Nisi Prius*.⁴

§ 1882. *Fourthly*, where evidence is rightly rejected at the trial, in consequence of its having been tendered on an untenable ground, a new trial will not be granted merely because it has since been discovered that the evidence was admissible on some ground other than that on which it was then tendered; but the party must go much further, and show, first, that he could not by due diligence have offered the evidence on the proper ground at the trial, and next, that manifest injustice will ensue from its rejection. His position, at the best, is that of a party who has discovered fresh evidence since the trial.⁵

§ 1882a. *Fifthly*, where evidence is rejected at the trial, the party proposing it should *formally tender* it to the judge, and request him to make a note of the fact. If this has not been done, and the judge has no note on the subject, the counsel cannot afterwards complain of the rejection of the evidence.⁶ If the witness whose evidence at the trial has been rejected become dangerously ill during the pendency of the appeal, the Court of Appeal has power to order his evidence to be taken *de bene esse* by a special commissioner.⁷

¹ *Goslin v. Corry*, 1844, 7 M. & Gr. 342; *Doe v. Benjamin*, 1839, 9 A. & E. 644.

² *R. v. Gibson*, 1887, 18 Q. B. D. 537 (C. C. R.); *R. v. Buttleton*, 1884, 12 Q. B. D. 266 (C. C. R.).

³ A bill of exceptions cannot be tendered on a criminal trial: *R. v. Esdaile*, 1858, 1 F. & F. 213 (Ld. Campbell). Such bills were abolished in civil causes by R. S. C. 1875, Ord. LVIII. r. 1. But the same object may be gained "by motion in the Court of Appeal founded upon an exception entered upon or an-

nexed to the record": 38 & 39 V. c. 77, § 22.

⁴ *Williams v. Wilcox*, 1838, 8 A. & E. 314; *Ferrand v. Milligan*, 1845, 15 L. J. Q. B. 103; *Bain v. Whitehaven and Furness Junction Rail. Co.*, 1880, 3 H. L. C. 19 (Ld. Brougham).

⁵ *Doe v. Bevis*, 1849, 18 L. J. C. P. 128.

⁶ *Gibbs v. Pike*, 1842, 12 L. J. Ex. 257; *Whitehouse v. Hemmant*, 1858, 27 L. J. Ex. 295; *Penn v. Bibby*, 1867, L. R. 2 Ch. 127 (Ld. Chelmsford, C.).

⁷ *Solr. to the Treasury v. White*, 1886, 55 L. J. P. 79 (C. A.).

§§ 1882b,
1883.

§ 1882B. *Lastly*, though evidence has been improperly admitted or rejected at Nisi Prius, or the judge has omitted to put to the jury a question which he was not asked to leave to them, the court will not grant a new trial, unless in its opinion "some substantial wrong or miscarriage has been thereby occasioned in the trial;¹ and if it appear to such court that such wrong or miscarriage affects part only of the matter in controversy, or some or one only of the parties, the court may give final judgment as to part thereof, or some or one only of the parties, and direct a new trial as to the other part only, or as to the other party or parties."² And on a motion in the High Court for a new trial in an action in the County or other Inferior Court,³ it is provided that, "On any motion by way of appeal from an Inferior court, the court to which any such appeal may be brought shall have power to draw all inferences of fact which might have been drawn in the court below, and to give any judgment and make any order which ought to have been made. No such motion shall succeed on the ground merely of misdirection or improper reception or rejection of evidence, unless, in the opinion of the court, substantial wrong or miscarriage has been thereby occasioned in the court below."⁴

§ 1883. The question of the admissibility on appeal of further evidence beyond that given at the trial of an action or the hearing of a matter sometimes requires consideration. Besides the rules, cited in preceding paragraphs, which apply principally to trials by jury, the Court of Appeal now possesses large powers

¹ As to what amounts to such substantial wrong or miscarriage, see *Manley v. Palache*, 1895, 73 L. T. 98.

² R. S. C. 1883, Ord. XXXIX. r. 6. The Scotch law on this subject is similar, and is embodied in § 45 of 13 & 14 V. c. 36 ("The Court of Session Act, 1850"), enacting that a bill of exceptions shall not be allowed by the Court of Session, upon the ground of the undue admission of evidence, if in the opinion of the court the exclusion of such evidence could not have led to a different verdict than that actually pronounced; and that it shall not be imperative on the court to sustain a bill of exceptions on the ground of the undue

rejection of documentary evidence, when it shall appear from the documents themselves that they ought not to have affected the result at which the jury by their verdict have arrived. To the like effect is § 167 of "The Indian Evidence Act, 1872." As to the Irish law, see *Hodson v. Mid. Gt. W. Rail. Co.*, 1877, Ir. R. 11 C. L. 109.

³ See and compare *Shapcott v. Chappell*, 1883, 12 Q. B. D. 58; and *Mathews v. Ovey*, 1884, 13 Q. B. D. 403.

⁴ See Ord. LIX. r. 7 (otherwise r. 15 of the Rules of October, 1884, which came into operation on that date).

both of *amending*¹ proceedings, and also of receiving *further evidence*. §§ 1883—1884.

§ 1883A. For, by Order LVIII., Rule 4, "the Court of Appeal shall have all the powers and duties as to amendments and otherwise of the High Court, together with full discretionary power to receive further evidence upon questions of fact, such evidence to be either by oral examination in court, by affidavit, or by deposition taken before an examiner or commissioner. Such further evidence may be given *without special leave* upon interlocutory application, or in any case as to matters which have occurred after the date of the decision from which the appeal is brought. Upon appeals from a judgment after trial or hearing of any cause or matter upon the merits, such further evidence (save as to matters subsequent as aforesaid) shall be admitted *on special grounds only*, and not without special leave of the court."

§ 1884. In the rule just cited the words "further evidence" mean any evidence not used at the trial or hearing in the court below. Provided it has not been so used, it falls within the rule, whether it be evidence altogether fresh, or evidence which has already been used in the same cause, or in any other cause between the same parties, and which might have been read at the trial had notice been given.² The court will not grant permission to admit further evidence as a mere matter of course, but will act cautiously in the matter, and will generally require some strong reason to be given for invoking its interference.³ It will also, of course, be more ready to admit documentary evidence than oral testimony after the pinch of the case has been ascertained;⁴ but still, it will be reluctant at any time to shut out any witness who will probably be able to throw some genuine light upon the matter:⁵ and it will grant the application all the more readily, if there be any ground for assuming that the court below has been deceived or otherwise misled by the testimony given.⁶

¹ As to the general powers of amendment, see ante, §§ 228—240.

² In re Chennell, *Jones v. Chennell*, 1877, 8 Ch. D. 492 (Jessel, M.R., in C. A.).

³ *Id.*; In re Weston's case, 1879, 10 Ch. D. 579 (C. A.).

⁴ In re Coal Economising Gas Co., *Ex parte Gover*, 1876, 1 Ch. D. 182 (C. A.); *Weston's case*, 1879, 10 Ch. D. 579 (C. A.) (Jessel, M.R.).

⁵ *Id.*

⁶ *Bigsby v. Dickinson*, 1877, 4 Ch. D. 24 (C. A.).

§§ 1884a
—1884c.

§ 1884A. When an appellant wishes to adduce *further evidence* upon the hearing of an appeal, and that evidence consists of an affidavit or other document,¹ he may, without any recourse to the court for leave, give notice to the respondent of his intention to apply at the hearing for permission to take such step,² but if the party wishes to examine a fresh witness, he must apply for leave by motion before the hearing.³

§ 1884B. When an appeal is brought from the finding of a jury on a question of fact it is not the province of the Court of Appeal to retry the question. The verdict must stand if it is one which the jury as reasonable men, having regard to the evidence before them, might have found, even though a different result would have been more satisfactory in the opinion of the judge who tried the case and the Court of Appeal.⁴ When, however, a case has been tried alone by a judge, without a jury, the appeal to the Court of Appeal is not governed by the rules applicable to applications for new trials after a trial and verdict by a jury, but amounts to a rehearing of the case; and although the appeal turns on a question of fact, the Court of Appeal reconsiders the materials before the judge, with such other materials as it may have decided to admit, and then makes up its own mind on the merits, not disregarding the judgment appealed from, but carefully weighing and considering it, and not shrinking from overruling it if on full consideration the court comes to the conclusion that the judgment is wrong.⁵ The court will, however, start with the presumption that the decision of the judge on the facts was right, and in a doubtful case the judgment of the court below on the facts is entitled to great weight.⁶

§ 1884c. A new trial may sometimes be obtained on the ground of the discovery of fresh evidence after the hearing, but,

¹ See *Dicks v. Brooks*, 1880, 15 Ch. D. 22; explaining *Hastie v. Hastie*, 1876, 1 Ch. D. 562.

² *Hastie v. Hastie*, 1876, 1 Ch. D. 562 (C. A.); *Justice v. Mersey Steel Co.*, 1875, 24 W. R. 199. See, as to the practice in Ireland, *Long v. Donegan*, 1873, Ir. R. 7 Eq. 494.

³ *Dicks v. Brooks*, 1880, 15 Ch. D. 22 (Jessel, M.R.).

⁴ *McArthur v. Dominion Cartridge Co.*, [1905] A. C. 72.

⁵ *Coghlan v. Cumberland*, [1895] 1 Ch. 704.

⁶ *Colonial Securities Co. v. Massey*, [1896] 1 Q. B. 38; and see *The Glannibanta*, 1876, 1 P. D. 281 (C. A.); *Bigsby v. Dickinson*, 1877, 4 Ch. D. 24 (C. A.), and the remarks of the Earl of Halsbury, L.C., in *Montgomerie & Co. v. Wallace-James*, [1904] A. C. at p. 75, on the duties of an appellate court rehearing a question of fact.

it being in the public interest that there should be an end to litigation after the facts have once been properly gone into, the right to a new trial on this ground is subject to considerable limitations and will only be granted in exceptional cases. Therefore the party applying must satisfy the court that the new evidence could not have been by reasonable diligence obtained before the hearing, and is such that if admitted would be practically conclusive to determine the trial the other way.¹

§§ 1884c,
1885.

1885.² This general view of the principles and rules of the Law of Evidence must here be brought to a close. The student will, it is hoped, rise from the study of such principles convinced, with Lord Erskine, that, with some few exceptions,³ "they are founded in the charities of religion,—in the philosophy of nature,—in the truths of history,—and in the experience of common life."⁴

¹ *Young v. Kershaw*, 1899, 81 L. T. 531. See, also, *Anderson v. Titmas*, 1877, 36 L. T. 711; *Taylor v. Taylor*, 1899, 81 L. T. 494.

² Gr. Ev. § 584, in great part.

³ See Index, tit. "*Suggestions for amending the Law of Evidence.*"

⁴ 23 How St. Tr. 966.

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